Supreme Court of the United States
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No. 07-

IN THE

Supreme Court of the United States

SEPHORA K. DAVIS,

Petitioner,

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rule 14(1)(a)

The record presents no questions of fact; it presents two questions of law, to wit:

(1) Is there a 14th amendment due process right to be free from a criminal prosecution not based upon probable cause? This Court previously considered that question in Albright v. Oliver, 510 US 266 (1994) but was unable to reach a consensus, rendering a plurality opinion. The Court has not revisited the issue since.

(2) To what extent, if any, should the answer to Question (1), or any alternative constitutional basis for relief - such as the right to be free from unreasonable seizures under the fourth amendment - be influenced or otherwise informed by the consideration of international law pertaining to commonly held standards of civilized behavior, where the criminal prosecution at issue may itself constitute - or aid and abet - the "crime against humanity" of rape and/or sexual violence?

THE PARTIES
Rule 14(b)

The parties herein are as listed in the caption, and there are no others.

CITATIONS TO DECISIONS AND ORDERS IN THE CASE
Rule 14(d)

None.

BASIS FOR JURISDICTION OF THIS COURT
Rule 14(e)

(i) The order appealed from, dismissing the Petitioner's appeal, was entered in the New York Court of Appeals on March 27th, 2007. The Petition is timely if filed within 90 days thereof (Rule 13)

(ii) There was no application for rehearing

(iii) Jurisdiction is conferred upon this Court by 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Rule 14(f)

International

Rome Statute of the International Court

United States Constitution

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Civil Practice Law and Rules (CPLR) Article 78

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STATEMENT OF THE CASE

A. FACTS

The Police Department of the Village of Mount Morris, New York (population 3300) is notoriously corrupt, particularly with respect to abuse of authority resulting in the sexual exploitation of young females like the Petitioner. In late 2004, the Chief of the Department was forced to resign amid allegations of sexual misconduct while on duty. He was replaced by another officer, an "acting chief" who was also forced to resign in early 2006 over his own sexual misconduct. That officer, in turn, was replaced by yet another "acting chief" who had himself been suspended and investigated over allegations of sexual misconduct on duty. (App. A-65 et seq.)

This fairly dramatic turmoil resulted in several members of the Village Board calling for the Mount Morris Police Department to be abolished, and by vote of the Mount Morris Village Board, a village referendum on that issue was scheduled in June, 2006. However, the politically very powerful police union had, in exchange for agreeing to the resignation of the first chief, obtained the agreement of the Village Board members that all allegations of misconduct against Mount Morris Police officers would be kept secret. Thus, those misconduct issues were never publicly raised. The police union organized a vigorous political campaign in defense of the Village Police Department, and prevailed in the June, 2006 referendum by a three-to-one vote.

This is the factual backdrop for what occurred to the Petitioner beginning in October, 2002.

Petitioner is not and never was a resident of the Village of

Mount Morris, but visited friends there often, and on October 30, 2002 (at age 17) she was involved in a minor motor vehicle accident in the Village. Summoned to the scene was a Mount Morris Village Police Officer named Dana Carson. In the course of investigating this minor incident, Carson obtained the Petitioner's cell phone number, and began calling her frequently, expressing romantic and sexual interest. Petitioner, aware and fearful of Carson's reputation and the reputation of Mount Morris Police officers generally, did not respond to Carson's advances or phone calls, and he became angry, leaving pointed messages on her voice mail. After months of being rebuffed, he finally stopped calling. (App. A-40, et seq.)

On December 8th, 2003, Petitioner was ill enough with a toothache that she went to a hospital in the morning and was given a pain killing drug. (App. A-35, 36) On the way back from the hospital, she stopped at a friend's house in Mount Morris. Petitioner and her friend were both marijuana users, and they sought out and obtained some marijuana from an acquaintance, Adrian Paige, who lived in the nearby Village of Geneseo, New York and was out on parole.

The marijuana combined with the pain killer she had received earlier had a profound effect on Petitioner, and she could no longer drive. (App. A-20, et seq.) Adrian Paige took over driving the Petitioner's car, and proceeded back to Mount Morris with Petitioner and her friend to pick up Eric Harder, a very large and cruel individual who also dealt in marijuana and owed Paige money. Paige, Harder, and Petitioner's friend then agreed to rob some rival drug dealers who were students at the State University of New York at Geneseo campus and resided nearby, and the incoherent Petitioner was brought along. Paige drove and

remained in the car with Petitioner, parked off site, while Harder and Petitioner's friend attempted the robbery.

Finding no victims, drugs, or money, the attempt was abandoned. Several hours having elapsed, Petitioner woke up and was able to drive after Paige and her friend were returned to their respective residences. That left Petitioner alone with Harder. (App. A-20, A-26)

Harder lured Petitioner into his Mount Morris apartment with the promise of marijuana, where he raped her at knife point and threatened to kill her. (App. A-27) After Petitioner begged for her life and promised "over and over" that she would never tell anyone he had raped her, Harder relented on his death threat, but he stayed with Petitioner for several hours during which he arranged to be driven to Petitioner's home in the Village of Avon, with Petitioner in the car, whereupon he also threatened to kill another member of her family if she ever told, emphasizing that he now knew where she lived. (App. A-27, 28)

Harder stayed with the terrified Petitioner and brought her back to her friend's house in Mount Morris, where Petitioner was tricked into sniffing heroin and became completely incapacitated. (App. A-28) In that condition, she was brought along for two further robbery attempts of the same drug dealers in Geneseo, the second one occurring at 4 AM on December 9th, again involving Paige and Harder with the addition of a third male, Shaun Theriault, who used a shotgun during the crime. (App. A-22, 23) In all the attempts, Petitioner was drugged to the point of incapacity and never left her car, which remained parked off site. The perpetrators used her car and cell phone in carrying out the crimes.

When the Geneseo police began their investigation much later in the morning on December 9th, the best information they had was that Petitioner's cell phone number had been "captured" by the victim's phone. They attempted a "controlled call" from the victim to Petitioner's cell phone, claiming to have more money which the robbers had demanded, to see if they could get the perpetrators to return so they could be identified and arrested. By the time this call occurred, Petitioner was back at home sleeping. She answered her phone and indicated she didn't know who the caller was or what they were talking about, and hung up. She called Adrian Paige to find out why someone she didn't know would be calling her. (App. A-28) Adrian, correctly concluding that this was a police set up, told the Petitioner not to worry, but stayed away and began feeding Petitioner information in case the police questioned her.

The police investigation of the incident meandered for six weeks. Geneseo Police suspected Petitioner's involvement because her phone had been used, but she provided the erroneous information she had been fed by Adrian Paige, including information that at the relevant time *she* had been driving her car in Geneseo in search of marijuana. Ultimately, she was interviewed by Geneseo Police and the Livingston County Sheriff's office on or about December 18th, nine days after the robbery. Confused, fearful for her life and that of her family, and mistrustful of police officers as a result of Dana Carson's earlier harassment, she refused to sign a statement police and her then-attorney had prepared on or about December 22nd and just hoped the matter would go away. (App. A-28, 29)

A strange break in the case occurred a month later, not from the Geneseo Police (where the crime had occurred) but rather from the infamous Mount Morris Police. Mount

Morris Police Officer Carson had made contact with one of the perpetrators - Eric Harder, Petitioner's rapist, who resided in Mount Morris. (App. A-40, et seq.) Carson, who had a habit of keeping his ear to the ground in the Village, had heard that Harder - who has a big mouth - was bragging about the Village that he had "had sex" with Petitioner. Curious and angered that the Petitioner would have sex with Harder and not him, Carson sought information from Harder, and learned how the December 9th crime in Geneseo had occurred - minus the fact that Harder had raped the Petitioner at knife point during the course of committing the other crimes.

Carson saw the opportunity to retaliate against the Petitioner for months of rejection, however, and began conspiring with Harder and others to falsely implicate the Petitioner as a willing participant, the "driver", or "wheelman", for the robbery, which also, by a strained interpretation of applicable law, might constitute a "kidnapping", an A-1 Felony exposing any participant to a potential life sentence. (App. A-75 to A-84)

B. ARREST AND PRE-INDICTMENT PROCEEDINGS

Based upon a statement Harder and Carson generated on January 23rd, 2004, Petitioner - who was then 18, still in high school, and had no criminal record - was surrounded by multiple police cars and arrested at gun point as she drove through the Village of Mount Morris later that same day. (App. A-29) She was arraigned on kidnapping and robbery charges in Geneseo Village Court and was thereafter released on bail. The felony charges were then pursued under a "superior court information" filed by the prosecutor in lieu of indictment by a Grand Jury, by

stipulation.

Paige and Harder were also arrested and charged immediately; Theriault had fled the area, but was later apprehended in Florida and extradited to New York.

Mount Morris Police Officer Dana Carson was credited with solving the case. He was shortly thereafter promoted to Sergeant within the Mount Morris Police Department, and Harder began working under Carson as a "confidential" police informant, although in reality his undercover activities are common knowledge in Mount Morris.

On April 4th, 2004, Paige, Theriault and Harder all entered felony guilty pleas in Livingston County Court in Geneseo. In their plea colloquys, each falsely stated that the Petitioner had been driving her car while the crime was being carried out. Theriault, who had carried and brandished the shotgun, received the longest sentence - eight years. Paige received five years. Harder, Petitioner's rapist, received two years and was released after six months under New York's "shock incarceration" program.

Upon being raped by Harder, Petitioner had been instantly concerned that she had become pregnant as a result of the rape. In fact, Petitioner did become pregnant about that time. That pregnancy was lawfully terminated on May 5th, 2004; however, between the brutal rape, her dramatic and violent arrest at gunpoint, the advent of a vigorous and high profile prosecution against her carrying a potential life term of imprisonment, and now an abortion over which she was morally torn, the Petitioner succumbed to extreme emotional distress, and began using illegal drugs extensively. (App. A-29, et seq.) This in turn led to further legal trouble. She also continued to keep the terrible secret

of Harder's rape, telling no one - not even her attorneys - with whom she more or less adhered to her original story as fed to her by Adrian Paige. (App. A-34)

Nevertheless, protesting her innocence of any robbery or kidnapping all along, Petitioner and her family hired and fired several attorneys; finally, in June of 2004 one attorney arranged a negotiated plea of guilty to Robbery with a sentence promise of two years in state prison. Ultimately, Petitioner rejected this offer and hired another attorney, whereupon the Respondent, Livingston County District Attorney Thomas E. Moran, Esq., sought an indictment on all the charges, including kidnapping.

C. GRAND JURY PROCEEDINGS

Respondent Moran, for his part, had provided virtually no pre-trial discovery materials to any of Petitioner's defense attorneys, even in connection with the negotiated plea. What material he did provide was only that which was consistent with the allegations against the Petitioner. Anything tending to contradict those allegations - and there was significant material of that kind - was withheld.

After he announced his intention to present charges against the Petitioner to the Livingston County Grand Jury, Petitioner's counsel indicated her intention, under New York law, to exercise her right to testify before the Grand Jury. Respondent Moran's response was a belligerent cinematic reference: "Make my day."

Respondent Moran presented the case to the Livingston County Grand Jury on October 6th and 13th, 2004. During the course of presenting the matter, and outside the hearing

of the Grand Jury, he denigrated the Petitioner and her family to certain witnesses and encouraged several witnesses to give testimony implicating the Petitioner, including Theriault and Paige. (App. A-24)

In the meantime, Petitioner's latest counsel had interviewed Adrian Paige in the Livingston County Correctional Facility near Mount Morris on October 9th and 11th, 2004. From Paige he learned - and this was the first time this information surfaced (at least *officially*) - that Adrian had been driving Petitioner's car at the relevant times, and that Petitioner had been "sick all day" and "out of it". Moreover, Adrian described an itinerary which potentially placed Petitioner alone with Harder for some time, an anomalous fact since Petitioner had been claiming to her attorney that she didn't know Harder "at all, whatsoever" and had never met him. (App. A-34)

After the interview with Paige, Petitioner's counsel obtained medical records which, combined with the information provided by Paige and the strange denials of his client, led him to suspect that Harder had raped the Petitioner during the events in question. (App. A-35 to A-37) But Petitioner had not told this to her attorney: she was still keeping the rape secret.

On October 13th, 2004 Petitioner appeared with counsel to testify before the Grand Jury. Reading a prepared statement, she informed the Grand Jury of the information that her attorney had obtained from Adrian Paige. Petitioner's counsel made several efforts to place evidence before the Grand Jury but could do so only through Respondent Moran. All of those efforts were rebuffed. During an interruption in the proceedings, Petitioner's attorney informed Respondent Moran of his suspicion that

Petitioner had been raped.

Respondent Moran suppressed the information about Harder's rape. In addition, upon information and belief, he encouraged the Grand Jury to disregard what they had learned from the Petitioner by erroneously advising them that they could not consider hearsay. Moreover, Respondent Moran knew - although Petitioner and her counsel did not because of Grand Jury secrecy rules - that the information received from Adrian Paige was in fact a recantation of earlier testimony he had given before the Grand Jury on October 6th, as well as a contradiction of the testimony of both Theriault and Harder. Upon information and belief, Respondent Moran did not so advise the Grand Jury.

As a result of this prosecutorial misconduct, Petitioner was indicted on seven felonies, including two counts of kidnapping in the first degree, carrying a potential sentence of up to 25 years to life in prison.

D. POST-INDICTMENT PRE-TRIAL PROCEEDINGS

After Petitioner's indictment her attorney sent her to several mental health professionals and rape crisis counselors in the belief this would yield the necessary details about the rape to use as evidence. Ultimately, however, these efforts failed and the attorney obtained the information from Petitioner personally on November 9th, 2004 after much wrangling and consternation.

The first set of what would be many motion papers were filed and served upon Respondent Moran on December 14th, 2004. The primary relief sought at that point was

dismissal of the indictment "in furtherance of justice", based upon the information Petitioner's counsel had at the time which, as it turned out, was woefully incomplete. Even so, in an accompanying letter to Respondent Moran, Petitioner's counsel noted the apparent impropriety of Mount Morris Police Officer Dana Carson's involvement in the investigation of the Petitioner (App. A-78), although all that was known at that time was that Carson had witnessed Eric Harder's January 23rd, 2004 statement, which had resulted in Petitioner's arrest and charging.

Further proceedings were delayed due to questions about Petitioner's competency to stand trial; but ultimately all of Petitioner's dispositive motions were denied by Livingston County Court Judge Ronald Cicoria on September 20th, 2005. Judge Cicoria scheduled a pre-trial hearing for October 25th, 2005 and just prior to that hearing, Respondent Moran provided police notes to Petitioner's counsel pointing to Dana Carson's extensive involvement in the investigation of the Petitioner, more than one year after she had been indicted, and ten months after Respondent Moran had been specifically put on notice, in writing, of the significance of any such information that might be in his possession. In addition, Petitioner's counsel's ongoing independent investigation indicated that there was other important exculpatory evidence being withheld by Respondent Moran.

Judge Cicoria retired at the end of 2005 and Petitioner's case was administratively assigned to Respondent Kohout, a Family Court Judge from adjoining Monroe County temporarily sitting in Livingston County while Judge Cicoria's replacement underwent judicial training.

Several more rounds of motions were brought on

Petitioner's behalf before Judge Kohout beginning in January, 2006, now based upon constitutional due process grounds, *inter alia*, given the apparent police misconduct and prosecutor misconduct in withholding evidence. Judge Kohout refused to hold any hearings, refused to compel discovery from Respondent Moran, denied all Petitioner's motions from the bench on April 19th, 2006, and ordered the case to trial.

E. PETITIONER SEEKS COLLATERAL RELIEF

On May 18th, 2006, Petitioner and her counsel commenced the within special proceeding, which is the subject of this Petition for Certiorari. (App. A-10 to A-43) The proceeding is authorized under Article 78 of New York's Civil Practice Law and Rules (CPLR) in the Nature of Prohibition against both Respondents, seeking to prohibit them from continuing their prosecution and adjudication of the Petitioner. The Petition and accompanying affidavits and exhibits raised the due process and other constitutional issues presented in this appeal (App. A-16), specifically citing this Court's decision in Albright v. Oliver, 510 US 266 (1994)(App. A-42).

Because an acting County Court Judge was named as a Respondent, the proceeding originated in the intermediate appellate court, the Appellate Division of the New York State Supreme Court for the Fourth Judicial Department. By scheduling order dated May 23rd, 2006 that court directed both Respondents to answer the Petition on or before June 20th, 2006. Respondent Kohout, represented by the New York State Attorney General, elected not to appear under CPLR 7804(i), neither admitting nor denying the Petitioner's allegations. Respondent Moran defaulted in

appearing.

Inexplicably, the Appellate Division refused numerous requests to grant a stay of the Livingston County Court criminal proceedings against the Petitioner even though a stay is specifically authorized under CPLR 7805; the result was that the criminal action, and the special proceeding to prohibit the Respondents from conducting the criminal action, continued simultaneously. Petitioner's counsel, having sued both the judge and the prosecutor, asked to be relieved in the criminal action and was relieved on July 6th, 2006. On August 8th, Petitioner obtained new counsel in Livingston County Court, retaining her original counsel in the Prohibition proceeding.

Upon Petitioner's application, on August 16th, 2006 the Appellate Division ordered Respondent Moran to answer or appear on or before September 5th, 2006 in lieu of a default judgment. (App. A-8) On September 1st, 2006, Respondent Moran submitted an Answer consisting of a "general denial" and accompanying affidavit and exhibit which failed to raise any factual dispute either with respect to Harder's rape, Carson's misconduct or his own misconduct. On September 5th, the Appellate Division scheduled argument on the matter for November 27th, 2006.

In the Prohibition proceeding, by motion dated September 20th, 2006 Petitioner's counsel moved for "judgment on the pleadings" based on Respondent Moran's failure in his answer of September 1st to dispute the allegations of the Petition dated May 18th, 2006 (App. A-51 et seq.). In that motion, Petitioner requested the Appellate Division to consider the potential relevance of international law to the matter, specifically citing the Rome Statute of the International Criminal Court, Article 7. (App. A-66,67)

In the criminal action, meanwhile, Respondent Kohout ordered Petitioner to stand trial in Livingston County Court on a "date certain" of December 4th, 2006. On or about September 20th, 2006 (the same date of Petitioner's motion for judgment in the Appellate Division) Petitioner's new counsel in the criminal action managed to obtain from Respondent Moran's office voluminous discovery materials that had not been provided previously in the now nearly three year old prosecution. Included in those never before provided materials were, among other things: a statement of the victim confirming that the Petitioner was completely ignorant of the crime she was charged with based upon the police "controlled call" which occurred only hours after the fact, a statement which arguably precluded the entire prosecution of the Petitioner under the "best evidence rule"; and evidence confirming that Dana Carson had indeed conspired with Petitioner's rapist and others to falsely implicate the Petitioner as the driver, or "wheelman" for the crime. (App. A-75 to A-84)

Back in the Prohibition proceeding, by motion dated September 26th, 2006 counsel for Respondent Moran cross-moved for judgment on the pleadings and opposed Petitioner's September 20th motion on purely legal grounds. Respondent's cross-motion again raised no factual disputes (App. A-71,72).

By order dated October 17th, 2006 the Appellate Division denied both Petitioner's motion and Respondent's cross-motion, exposing Respondent Moran to a potential trial as a Respondent in the Appellate Division (App. A-4).

Back in the criminal action, on or about October 17th, Respondent Moran offered Petitioner a violent felony plea

deal which permitted her to deny guilt under this Court's decision in North Carolina v. Alford, 400 US 25 (1970) and required, *inter alia*, three and one half years in state prison, but he set a rapid deadline of October 20th, after which the offer would be withdrawn, leaving the Petitioner to face the risk of 25 years or more in prison. Petitioner, exhausted after nearly three years of fighting her rapist (aided and abetted by the entire Livingston County law enforcement establishment), having been denied a stay of the criminal action against her even after her claims had been ruled meritorious, and understandably unwilling to risk the lengthy period of imprisonment that would attend an unfavorable result at trial, accepted Respondent Moran's offer and entered her Alford plea on October 20th, 2006.

Respondent Kohout accepted the plea and scheduled sentencing for January 3rd, 2007.

Meanwhile, back in the Prohibition proceeding, Petitioner's counsel had been conducting further investigation pertaining to the evidence obtained from Respondent Moran in September, and renewed Petitioner's motion for judgment on the pleadings based upon this newly discovered evidence and the investigation thereof by motion dated November 17th, 2006. (App. A-75, et seq.) Also on November 17th, counsel for Respondent Moran moved to dismiss the Prohibition proceeding on the ground it had been rendered "moot" by Petitioner's plea.

Petitioner's prohibition proceeding was argued in the Appellate Division on November 27th, 2006.

On December 22nd, 2006, based upon Petitioner's plea, the Appellate Division issued a memorandum and order dismissing the special proceeding and all pending motions

on mootness grounds (App. A-2, 3).

On December 28th, 2006, Petitioner appealed to the New York Court of Appeals, the state's highest court.

Back in the criminal action, Respondent Kohout sentenced Petitioner to the agreed upon prison term as scheduled on January 3rd, 2007 and the Petitioner was taken into custody.

In the Prohibition proceeding, by motion dated January 25th, 2007 Petitioner also moved in the Court of Appeals for permission to appeal to that court, as is common practice when bringing an appeal to that high court. In that motion, Petitioner again raised the federal constitutional and due process issue presented here, specifically citing the Albright case in the first question presented for review" (App. A-6).

By order dated March 27th, 2007 the Court of Appeals dismissed Petitioner's appeal and motion for permission to appeal "...upon the ground that the issues presented have become moot." (App. A-1), presumably as a result of the Petitioner having been sentenced by Respondent Kohout on January 3rd.

ARGUMENT

I. THIS PROCEEDING IS NOT MOOT

Both courts below dismissed Petitioner's Petition and appeal on "mootness" grounds. However, even in cases arising in the state courts, the question of mootness in this

Court is a federal one. Love v. Griffith, 266 US 32 (1924) And the federal standard requires only "...a real and substantial controversy admitting of specific relief of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 US 227 (1937)

This appeal is hardly a "hypothetical state of facts". The Petitioner is currently incarcerated at the Albion Correctional Facility of the New York State Department of Corrections, by order of Respondent Kohout at the urging of Respondent Moran.

Should this Court grant certiorari it will maintain personal jurisdiction over both Respondents. Those Respondents are the prosecutor and judge who, respectively, obtained and accepted the Petitioner's *Alford* plea and sentenced her to state prison.

This Court cannot directly exercise jurisdiction over the criminal action against the Petitioner; that is, it cannot directly vacate the sentence and the plea and dismiss the indictment. But this is immaterial: having continuing personal jurisdiction over both Respondents, it can order the Respondents to do all those things under penalty of contempt, or cause the Appellate Division to so order. This is, of course, what a special proceeding in the nature of prohibition contemplates. The proceeding is now, and was from the beginning, a collateral attack upon the wrongful criminal prosecution of the Petitioner through the simple to understand mechanism of legal compulsion of those public officials who are conducting that prosecution.

Respondents Kohout and Moran continue to have full authority and jurisdiction to order the New York State

Department of Corrections to produce the body of the Petitioner in Livingston County Court, and to thereupon vacate her plea and judgment of conviction and dismiss the indictment which produced them; and this Court has full authority and jurisdiction to cause Respondents Kohout and Moran to do exactly that. This Court may decide not to do so; however there is no question that it *can* do so, and it is difficult to understand how either of the courts below - which possessed the same power - came to the conclusion that the matter was moot simply because the Petitioner pleaded or was sentenced. If it was impossible to undo a conviction and sentence then every criminal appeal would likewise be moot.

It is possible that the courts below came to their mootness conclusions based upon a narrow interpretation of "prohibition" under state law, but neither the Appellate Division nor the Court of Appeals offered a cogent explanation. In any event, this Court is free to provide a remedy to this Petitioner unhampered by such state law considerations in order to vindicate the federal right, should one be recognized. To hold otherwise would effectively mean that state law could deprive this Court of its inherent power to review state actions and proceedings for federal constitutional infirmity. Even if confined to "justiciability" issues like "mootness", such a result would be a repudiation of the fundamental and historical role of this Court in our legal system.

II. THE WITHIN PROCEEDING PRESENTS THE ISSUE IN ALBRIGHT PERFECTLY AND CLEANLY

A. There are no issues of fact.

The Answer submitted by Respondent Moran to the

Petitioner's Petition in the Appellate Division was a "general denial". By settled law in New York, a general denial is insufficient to raise an issue of fact. Howell v. Benson, 105 Misc.2d 757 (Albany County, 1980) The Answer was accompanied by an affidavit from Respondent Moran, which likewise did not dispute any of the material allegations made by the Petitioner against Respondent Moran. Moreover, in the entire course of the proceeding and the underlying criminal action, no affidavit from Eric Harder or Dana Carson was ever produced, which was required to dispute the allegations against them. Zuckerman v. City of New York, 49 NY2d 557 (1980)(attorney affidavit not based on personal knowledge has no probative value). At all relevant times, both Carson and Harder, who remained a police officer within Livingston County and a police informant, respectively, were under the control of Respondent Livingston County District Attorney Moran.

Accordingly, Harder's rape of the Petitioner is not disputed. Carson's obscene misconduct is undisputed. Respondent Moran's own misconduct, in the form of withholding exculpatory evidence from Petitioner and her attorneys prior to indictment, the knowing presentation of perjured testimony to the Grand Jury, suppression of exculpatory evidence before the Grand Jury and mal-instruction to the Grand Jury, and the unlawful withholding of exculpatory evidence for nearly two years thereafter were never specifically denied by Respondent Moran in a sworn statement and, accordingly, are all undisputed.

On the record, therefore, this appeal presents no issues of fact for this Court to consider or resolve.

B. The within case presents the constitutional issue more clearly and simply than *Albright*

1) An action under 42 U.S.C. 1983 will always implicate federalism concerns; the within proceeding presents no such difficulty

An action under 42 U.S.C. 1983, as the Albright case was, generally concerns monetary damages in an action authorized by federal statute. Because this method of redress necessarily involves access to the federal courts for adjudication, this procedural posture inherently implicates federalism concerns even as it presents an important substantive question of federal constitutional law.

By contrast, the within appeal comes to this Court through a "special proceeding" authorized under New York law, brought exclusively in the New York state courts, presenting the constitutional issue to this Court on certiorari purely as a matter of federal constitutional supremacy. This manner of presentation of the issue will permit this Court to rule definitively upon the question of federal constitutional law while leaving the states free to abide by the Court's ruling in their own way and without exposing them to federal court interference, a result far more consonant with the delicate balance of federalism this Court is understandably anxious to maintain than the Court previously encountered in Albright.

The within special proceeding is authorized by New York's CPLR Article 78. This civil practice law incorporated the ancient writs of prohibition, mandamus and certiorari into the current "special proceeding". The traditional law of these ancient writs is that they are granted only as a matter of judicial discretion, never as a matter of right. LaRocca

v. Lane, 37 NY2d 575 (1975)

Under the supremacy clause of the United States Constitution, however, if there is a federal constitutional right involved it must be respected, traditional law pertaining to ancient writs notwithstanding. In other words, the rule of law in New York that prohibition is "never a matter of right" must yield if there *is* a right under the federal constitution.

But that is as far as this Court need press the matter: it is unnecessary to issue any further directives or prescribe any procedures for New York courts to follow, because New York already has the procedure in place. To be sure, there may be corollary issues that must be resolved if a constitutional right is recognized (e.g., what sort of evidentiary showing will constitute prima facie proof that the constitutional right is implicated?). This Court can either speak to such matters, as it did in Franks v. Delaware, 438 US 154 (1978); or it can leave New York courts completely free to develop their own law on the matter, subject of course to federal constitutional imperatives.

2) The best way to present the issue is through an attempt to stop the wrongful prosecution - precisely the scenario this case represents.

a) The within proceeding resolves the difficulty of the Albright question being rendered academic by the conclusion of criminal proceedings.

In New York, as in many other jurisdictions, interlocutory appeals are not permitted in criminal cases. See generally, New York Criminal Procedure Law Article 460 This

makes it impossible to properly present the Albright issue to an appellate court on a direct appeal, since in that case the criminal action will have concluded, either with a conviction or an acquittal. The question presented by Albright can then seem "superfluous", as noted by Justices Kennedy and Thomas in their concurring opinion: "If the charges are not proved beyond a reasonable doubt at trial, the charges are dismissed; if the charges are proved beyond a reasonable doubt at trial, any standard applicable to the initiation of charges is irrelevant because it is perforce met." Albright, supra, 510 US at 283

Justices Scalia and Souter voiced similar concerns. In his concurring opinion in Albright, Justice Scalia noted that the criminal charges against the Petitioner in that case had been dismissed, opining that "One can conceive of many abuses of the trial process...that might cause a criminal sentence to be a deprivation of life, liberty or property without due process. But here there was no sentence..." 510 US at 275 Justice Souter, for his part, maintained that Albright had failed to allege a "substantial deprivation of liberty from the mere initiation of prosecution". 510 US at 289

In the instant case the Petitioner has been convicted and sentenced to imprisonment under an *Alford* plea in the underlying criminal action; but the within collateral proceeding, challenging and seeking to stop her wrongful prosecution by the Respondents, was already pending. Thus the issue of a wrongful *prosecution* is preserved on this appeal and in this procedural posture while at the same time Justice Scalia's and Justice Souter's objection in Albright - i.e., that no real harm occurred, therefore there was no due process violation - is met.

In addition, the nature of an *Alford* plea is that guilt is

denied, but the Defendant makes a bargain with the prosecutor due to the risks in submitting to a trial. In other words, an *Alford* plea is not the result of an adjudication of factual guilt, but is a compromise based solely on the fact that the Defendant is being prosecuted at all. It is therefore quite proper to say that the plea and sentence the Petitioner has suffered was entirely the result of "the mere initiation of prosecution", answering Justice Souter's concern that Albright had suffered no such substantial harm.

Also in response to both Justice Scalia's and Justice Souter's skepticism that a sufficient "quantum of harm" had occurred to Petitioner Albright to implicate the Due Process Clause, the Court should consider: this Petitioner was forced to place in issue, in the course of defending herself from Respondents' prosecution, extremely personal and private matters, such as her forcible and violent rape by Eric Harder; her abortion upon her subsequent pregnancy; her medical and psychological condition and history; and even her sexual history, habits and practices. These are the kind of matters that in the more recent jurisprudence of this Court have implicated the Due Process Clause under the umbrella of the "right to privacy". Griswold v. Connecticut, 381 US 479 (1965)

b) Better still is that the attempt to stop the wrongful prosecution occurred in state court, not federal court.

The Petitioner might well have sought relief in federal court, and indeed a federal habeas corpus proceeding seeking an injunction against Petitioner's further prosecution was brought in October, 2005 but was subsequently withdrawn when the New York State Attorney General refused to appear in that proceeding and waive the "exhaustion" requirement. In the absence of such

a waiver, the federal habeas proceeding faced no less than three significant barriers: the requirement that all state remedies be "exhausted"; the near blanket rule of federal court abstention under Younger v. Harris, 401 US 37 (1971) and the anti-injunction statutes; and the open question of constitutional law (Albright) that formed the basis for relief in the first place.

An appeal from the near-certain denial of habeas relief would have presented all three issues, whereas the within procedural posture presents only the Albright issue. This not only clarifies and simplifies the issues required to resolve the case; it also leaves the other important questions for another day, where they may be resolved on their own terms. It is quite possible, for example, that this Court might find in favor of the due process right the Petitioner will urge in this case, but will nevertheless require federal courts to continue to abstain from enforcing that right as over and against state court criminal prosecutions out of legitimate federalism concerns. cf., Younger, Id.

C. The within appeal addresses other concerns by the plurality, Justice Ginsburg, Justice Souter and Justices Kennedy and Thomas as expressed in their opinions in Albright, making the resolution of the Albright question more likely in this case.

1. The plurality opinion

The plurality expresses an understandable and oft heard reluctance to expand the concept of [substantive] due process "...because the guideposts for responsible decision making in this unchartered area are scarce and open-ended." Albright, supra, 510 US at 272 (quoting Collins v. Harker Heights, 503 US 115 (1992)

The within appeal answers this concern in two ways. First, the undisputed facts of this case are so outrageous and horrifying, and make such a mockery of the "process" of Petitioner's charging, arrest, indictment, conviction and sentencing, that taking up the Albright issue in this context is likely to *clarify* the outer boundaries of our concept of due process by setting an obvious moral floor beneath which no criminal prosecution can proceed, on the one hand; or by making it clear that no such floor exists, on the other. In other words, hearing this appeal will actually erect the much needed "guideposts" of such concern to the Albright plurality and leave our concept of due process *less* "open-ended", not more.

Second, as more fully appears below, this appeal presents this Court with an opportunity to consider whether international law might inform constitutional jurisprudence where, as in this case, the adjudication of an issue may involve an irreducible moral concept, such as "conscience shocking". Again, this question could be considered in a very limited and narrow way that might also help to clarify, rather than obscure, the due process rule lower courts must observe.

2. Justice Ginsburg's opinion

While Justice Ginsburg was primarily concerned with keeping Albright's claim in a fourth amendment framework which he had abandoned, she did note the anomaly of claiming a "malicious prosecution" in a procedural context - an action under 42 U.S.C. 1983 - in which the primary responsible party, the prosecutor, is immune. 510 US at 279 (footnote 5)

Obviously such a concern would not apply here, where the prosecutor is a named party in a proceeding under state law and is not immune from suit.

In addition, this Petitioner will not disclaim all reliance on a fourth amendment basis for relief, as Petitioner Albright did.

3. The opinion of Justices Kennedy and Thomas:

This opinion viewed this Court's decision in Parratt v. Taylor, 451 US 527 (1981) as dispositive. Even assuming, arguendo, "...that some of the interests granted historical protection by the common law of torts...are protected by the Due Process Clause...a state actor's random and unauthorized deprivation of that interest cannot be challenged under 42 U.S.C. 1983 so long as the State provides and adequate post-deprivation remedy." 510 US at 283 and 284

This objection is inapplicable to the within appeal, as the within appeal does not involve an action under 42 U.S.C. 1983. Moreover, this appeal assumes that the state remedy already invoked (i.e., a special proceeding under CPLR Article 78) is an adequate remedy so long as it incorporates the rule of federal constitutional law this Court has yet to enunciate. Thus once again, this appeal dispenses with the impediments posed by federalism concerns and presents the issue to be decided purely as a matter of federal constitutional supremacy.

III. THE WITHIN APPEAL PROVIDES AN OPPORTUNITY TO AGAIN CONSIDER THE ROLE OF INTERNATIONAL LAW, IF ANY, IN CONSTITUTIONAL JURISPRUDENCE

This Court has previously considered a very limited role for international and foreign law where a case presents issues that are not explicitly articulated in the language of the constitution, but appear to involve basic rules of conduct or morality that may be implicit in the constitution, and are in any event commonly held by the broader human community. Roper v. Simmons, 543 US 551 (2005); see also, Lawrence v. Texas, 539 US 558 (2003)

Petitioner argued in the court of first instance that Respondents' criminal prosecution of her constituted the "crime against humanity" of rape and sexual violence, proscribed by the Rome Statute of the International Criminal Court Article 7. Essentially, Petitioner argued that her prosecution was a state sponsorship of Harder's rape, and that when seen as part of the Mount Morris Police Department's systematic sexual exploitation of young women, amounted to a crime of international magnitude.

Thus this issue is raised and preserved in this appeal for this Court to consider, which, as noted above, may prove particularly helpful in articulating a standard for "conscience-shocking" as it may relate to defining the lower moral limits of official conduct - below which a due process violation will be found.

IV. IT IS IMPORTANT TO RESOLVE THE ALBRIGHT ISSUE

Albright itself was in part a response to what had been termed "...an embarrassing diversity of judicial opinion...". Albright v. Oliver, 975 F.2d 343, 345 (7th Cir., 1992)(citing Brummett v. Camble, 946 F.2d 1178, 1180 (fn. 2)(5th Cir., 1991).

One bright young commentator recently surveyed circuit court opinions since Albright and noted that in Albright's wake there was "controversy and confusion", "muddied waters" and even a "minefield". See Goldstein, Jacob Paul: From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecution, 106 Columbia L. Rev. 643 (April, 2006)[citing Kerr v. Lyford, 171 F.3d 330 (5th Cir., 1999); Taylor v. Meacham, 82 F.3d 1556 (10th Cir., 1996); Reed v. City of Chicago, 77 F.3d 1049 (7th Cir., 1996)].

In addition, in this very proceeding it appears that the unsettled nature of the law in this area may have resulted in the Petitioner's conviction and imprisonment. There has been only one ruling on the merits in the courts below: the order of the Appellate Division, Fourth Department, dated October 17th, 2006. That order denied both Petitioner's and Respondent Moran's motions for judgment as a matter of law. Since no factual disputes existed, the only explanation for this ruling is that the law governing the outcome was too unclear for the Appellate Division to make a decision.

Only this Court can resolve all of this uncertainty, by re-visiting the issue presented by Albright and deciding it.

STATE OF NEW YORK COURT OF APPEALS

4 Mo. No. 194

In the Matter of Sephora K. Davis,

Appellant

v.

Joan S. Kohout, as Acting Livingston
County Court Judge, and Thomas E. Moran,
As Livingston County District Attorney,

Respondents.

On the Court's own motion, appeal dismissed, without costs, upon the ground that the issues presented have become moot. Motion for leave to appeal dismissed upon the ground that the issues presented have become moot.

Entered: March 27, 2007

s/Clerk of the Court

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

SEPHORA K. DAVIS,

Petitioner

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

MEMORANDUM AND ORDER

Proceeding pursuant to CPLR article 78 [initiated in the Appellate Division for the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506(b)(1)] to prohibit respondents from proceeding with the underlying criminal action in the Livingston County Court.

It is hereby ORDERED that the petition be and the same hereby is unanimously dismissed without costs.

Memorandum: While an indictment was pending against petitioner, her attorney became concerned that the Livingston County District Attorney had knowingly used perjured testimony before the grand jury and intended to do so at trial. Petitioner's attorney commenced this original CPLR article 78 proceeding in this Court seeking a writ of

prohibition prohibiting County Court and the District Attorney from proceeding with the underlying criminal action. Thereafter, petitioner's attorney was permitted to withdraw from representing petitioner in the criminal action, but he continued to represent petitioner in this proceeding. It is uncontroverted that petitioner, represented by a different attorney, has entered an *Alford* plea in satisfaction of the indictment. In view of petitioner's guilty plea, this petition must be dismissed as moot. Petitioner chose not to litigate the issue of her guilt in the underlying action and thus the allegations in her petition are academic.

Entered: December 22, 2006

JoAnn M. Wahl
Clerk of the Court

DOCKET NO. OP-06-01392

PRESENT: HURLBUTT, J.P., KEHOE, SMITH, CENTRA, AND PINE, JJ.

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

SEPHORA K. DAVIS,

Petitioner

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

Petitioner having renewed the motion for a stay of all proceedings in the criminal action against her (People v. Davis, Indictment No. 2004-276) in Livingston County Court pending the hearing and determination of this original article 78 proceeding, and for summary relief, and repondent Thomas E. Moran having cross moved for summary relief and other relief,

Now, upon the reading and filing the affirmation of John M. Regan, Jr. dated September 20, 2006, the petition verified May 17, 2006 with attached affidavits and exhibits, the affidavit of Jacklyn M. Rodgers sworn to September 19, 2006 the notice of motion with proof of service thereof, the

opposing affirmation of James V. D'Anza dated September 26, 2006, the notice of cross motion with proof of service thereof, the reply affirmation of John M. Regan, Jr. dated September 29, 2006, and due deliberation having been had thereon,

It is hereby ORDERED that the motion and cross motion be, and the same heret y are, denied.

Entered: October 17, 2006

s/ JoAnn M. Wahl, Clerk

QUESTIONS PRESENTED FOR REVIEW

1. Shall a criminal defendant have recourse as a matter of constitutional or statutory right to a collateral attack upon a public prosecutor who has willfully, maliciously and intentionally prosecuted her through the use of perjured testimony before a Grand Jury which resulted in an illegal indictment?

a. Is such a right grounded in the United States Constitution, as applicable to New York through the 14th Amendment, by either the 4th amendment or "substantive" or "procedural" due process? cf., Albright v. Oliver, 510 US 266 (1994); Franks v. Delaware, 438 US 154 (1978)(finding an analogous right with respect to perjured testimony in support of a warrant application)

b. Is such a right, although not grounded in the United States Constitution, conferred by the corresponding provisions of the New York State Constitution or statutes? cf., People v. Pelchat, 62 NY2d 97 (1984); People v. Alfinito, 16 NY2d 181 (1965)(same issue as in Franks v. Delaware, supra, resolved by construing New York statutes as conferring such a right); or, in the alternative

2. If this Court upon consideration declines to recognize such a right or to reach the constitutional or statutory issues, shall the Order and Memorandum of the Appellate Division, Fourth Department, dated December 22nd, 2006 dismissing the Petitioner/Appellant's Petition be reversed as a matter of the discretion traditionally employed by courts in Article 78 Proceedings in the Nature of Prohibition? cf., LaRocca v. Lane, 37 NY2d 575(1975); and

3. If the Court answers either of the foregoing questions in the affirmative, shall the Petitioner/Appellant be entitled to monetary damages as provided under CPLR 7806, and the matter be remitted to the Appellate Division, Fourth Department, for a determination of the amount of such damages? Or,

4. Is the within appeal "moot" as a result of the Court being unable to grant meaningful relief to the Petitioner/Appellant, or is the Court still able to afford the Petitioner full or partial, yet meaningful, relief?

5. If the Court finds that the within appeal is moot, does the appeal nevertheless qualify as an exception to the mootness doctrine as enunciated in Matter of Hearst v. Clyne, 50 NY2d 707 (1980)?

DOCKET NO. OP-06-01392

PRESENT: HURLBUTT, J.P., SCUDDER, GREEN, AND PINE, JJ.

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

SEPHORA K. DAVIS,

Petitioner

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

Petitioner having moved for a default judgment in this original CPLR article 78 proceeding, or in the alternative for other relief,

Now, upon reading and filing the affirmation of John M. Regan, Jr. dated August 2, 2006, the petition verified May 17, 2006 with attached affidavits and exhibits, the notice of motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED that the motion be, and the same hereby is, granted to the extent that a default judgment will be entered unless respondent Thomas E. Moran files and serves and answer in accordance with 22

NYCRR 1000.9(b) on or before September 5, 2006.

Entered: August 16, 2006

s/JoAnn M. Wahl, Clerk

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

In the Matter of the Application of

SEPHORA K. DAVIS,

Petitioner

For a Judgment under Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

NOTICE OF PETITION

SIRS:

PLEASE TAKE NOTICE, that upon the annexed Petition SEPHORA K. DAVIS, verified the 17th day of May, 2006, and the Exhibits annexed thereto; and upon the affidavit of the Petitioner sworn to the 17th day of May, 2006; and upon the affidavit of ADRIAN L. PAIGE, sworn to the 3rd day of May, 2006; and upon the affirmation of

JOHN M. REGAN, JR., ESQ., attorney for the Petitioner, affirmed the 17th day of May, 2006, an application will be made to a regular Term of this Court to be held at the Courthouse thereof located at 50 East Avenue in the City of Rochester, New York on the ___ day of _____, 2006 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for a judgment pursuant to CPLR Article 78 in the nature of Prohibition, and for such other and further relief which may be just, equitable and proper.

TAKE FURTHER NOTICE, that an Answer and supporting affidavits, if any, shall be served at least five (5) days before the aforesaid date of hearing.

Petitioner designates the Appellate Division, Fourth Department, as the place of trial, pursuant to CPLR Rule 506.

Dated: May 17, 2006

REGAN & REGAN, Attorneys
John M. Regan, Jr., Esq., of counsel
Attorneys for the Petitioner
SEPHORA K. DAVIS
Office and Post Office Address
29 Hoyt Place
Rochester, NY 14610
585.546.8880

TO:

Hon. Joan S. Kohout
Acting Livingston County Court Judge
Livingston County Courthouse
Genesco, NY 14454

Thomas E. Moran, Esq.
Livingston County District Attorney
Livingston County Courthouse
Geneseo, NY 14454

Hon. Elliot Spitzer
NYS Attorney General
144 Exchange Blvd.
Rochester, NY 14614

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

In the Matter of the Application of

SEPHORA K. DAVIS,

Petitioner

For a Judgment under Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

VERIFIED PETITION

The Petition of SEPHORA K. DAVIS respectfully alleges:

1. Petitioner is the Defendant in a criminal action currently pending in Livingston County Court before Respondent HON. JOAN S. KOHOUT, Judge, and being

prosecuted by Respondent THOMAS E. MORAN, ESQ., Livingston County District Attorney. Petitioner was "indicted" on October 13, 2004 by a Livingston County Grand Jury at the urging of Respondent Moran. A copy of the so-called indictment is annexed hereto as Exhibit "A" and made a part hereof.

2. Respondent Moran knowingly presented perjured testimony to obtain the indictment. Moreover, the undeniable fact that perjury has been committed in the course of the proceedings pertaining to this "indictment" has been brought to the attention of Respondent Kohout, who has nevertheless refused to dismiss the indictment or even hold evidentiary hearings to determine the nature and extent of the perjury. To the extent she is able to appreciate the gravity of this situation at all, Respondent Kohout apparently believes this is a "trial issue".

3. The conduct of the Respondents in this case could not be more unjust, since far from being guilty of the crimes alleged in the indictment, the Petitioner was the truest and most innocent victim of the events. As more fully appears from the annexed affidavit of the Petitioner, the Petitioner was raped at knife point by her supposed accomplice, Eric Harder. Harder then threatened to kill her and her younger sister if she ever told anyone; and to drive the point home he stalked the Petitioner to her home in Avon, Livingston County so that she would know that he knew where she and her sister lived. Hopelessly traumatized from the brutal rape and frightened beyond measure by Harder's threats, she was tricked into taking heroin, which incapacitated her. She was then driven around in her own car in that condition while her supposed accomplices used the car, and her cell phone, in the course of carrying out the crimes.

4. Incredibly, Respondent Moran cut a lenient plea deal with Harder, Petitioner's rapist, in exchange for

Harder's perjury in implicating the Petitioner. In fact, Petitioner's initial arrest on January 23, 2004 - a violent arrest at gun point perpetrated against her by police even *though she had previously appeared for police questioning* with counsel - was prompted by a statement given by Harder to a police officer named Dana Carson. Dana Carson had been aggressively pursuing the Petitioner sexually since October of 2002 and was angry that Petitioner had not responded to his advances. Harder's statement to Carson was also false.

5. All of this has been extensively detailed to Livingston County Court in numerous motions and supporting submissions by Petitioner's counsel, but the Respondents continue to proceed against the Petitioner unlawfully and without jurisdiction.

6. One of the Petitioner's other supposed accomplices, Adrian Paige, recanted his testimony to the Grand Jury while the Grand Jury still sat, and offered to return to correct his testimony - and help exonerate the Petitioner - through Petitioner's counsel, although that offer was refused. Adrian Paige has provided an affidavit which is annexed hereto and made a part hereof. Adrian Paige even confirms that there was an agreement between himself and the other two co-Defendants to commit perjury in order to protect themselves from a kidnapping charge. Ironically, they believed they were at risk of being charged with kidnapping the Petitioner.

7. It is obvious that if Adrian Paige's recantation is true, then any testimony that the Petitioner was a knowing participant in the crimes alleged is perjured.

8. The fact that Harder was committing perjury in numerous aspects of his Grand Jury testimony is confirmed by the affidavit of an individual named Stephanie Fox. She provided an affidavit to Livingston County Court dated February 7, 2006 which is annexed hereto as Exhibit "B".

Harder placed Stephanie Fox in the company of himself and Adrian Paige in his testimony before the Grand Jury (Exhibit "C"), but Stephanie Fox doesn't even know either one of them. Adrian Paige also confirms this in his affidavit.

9. Respondent Moran was aware of Adrian Paige's recantation, along with the substance of Stephanie Fox's information - and the resultant overwhelming likelihood that Harder had committed perjury before the Grand Jury - while he was still presenting the matter; but Moran unlawfully procured the "indictment" anyway.

10. A prosecutor cannot lawfully procure or proceed upon an indictment based on perjury. A court must dismiss such an indictment, as this is a problem of constitutional dimension. People v. Pelchat, 62 NY2d 97 (1984) Moreover, if our system of justice is to have any integrity, it must be recognized that an indictment based on perjury is no indictment at all; thus a criminal court has no jurisdiction to proceed with such an indictment. An Article 78 proceeding in the nature of Prohibition is a proper method to challenge an illegal indictment. Paciona v. Marshall, 45 AD2d 462 (4th Dept., 1974)

11. In addition, an unlawful arrest - as occurred here based upon Harder's false statement of January 23rd, 2004 statement and officer Dana Carson's outrageous misconduct, involving himself in an investigation of a Defendant he resented for sexually rejecting him - deprives the criminal court of jurisdiction over the *person* of the Defendant.

12. The Petitioner herein has no other plain, adequate, or complete remedy at law for the relief sought herein, except to submit to a trial of the underlying matter, which would in itself be an injustice of immense proportions and a permanent blight upon our legal system.

13. No previous application has been made to the

Court or any Justice thereof for the relief requested herein or any similar relief.

WHEREFORE, Petitioner requests that a judgment in the nature of prohibition be issued out of this Court and directed to the Respondents, and each of them, prohibiting them from performing or taking any further acts or proceedings in or in connection with the underlying criminal action;

TOGETHER with such other, further and different relief which to the Court seems just, equitable and proper.

Dated: May 17, 2006

Yours, etc.

REGAN & REGAN

John M. Regan, Jr., Esq., of counsel
Attorneys for the Petitioner
SEPHORA K. DAVIS
Office and Post Office Address
29 Hoyt Place
Rochester, NY 14610
585.546.8880

s/SEPHORA K. DAVIS

VERIFICATION

SEPHORA K. DAVIS, being duly sworn, deposes and says that she is the Petitioner herein and that she has read the foregoing Petition and that the contents of the same are true to her own knowledge, except for those matters

states upon information and belief, and as to those matters she believes them to be true.

Dated: May 17, 2006

s/SEPHORA K. DAVIS

Sworn to before me this

17th day of May, 2006

s/John M. Regan, Jr.
Notary Public

states upon information and belief, and as to those matters she believes them to be true.

Dated: May 17, 2006

s/SEPHORA K. DAVIS

Sworn to before me this

17th day of May, 2006

s/John M. Regan, Jr.
Notary Public

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

SEPHORA K. DAVIS,

Petitioner

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

AFFIDAVIT

ADRIAN L. PAIGE, being duly sworn, deposes and says:

1. I am a co-Defendant of the Petitioner. I pleaded guilty to the crime of Robbery in the Second Degree in April, 2004, and am currently serving my agreed upon sentence of five years in state prison. I am making this affidavit at the request of Mr. Regan, the Petitioner's attorney. I am personally familiar with the facts underlying the Petitioner's prosecution.

2. I am acquainted with the Petitioner, I consider her a friend but we have never been really *close* friends. We didn't really "hang out" together. As of December of 2003, the Petitioner would occasionally baby-sit the children of my girlfriend and myself. I would also sometimes provide the Petitioner with marijuana. At the time I was 24 years old and the Petitioner was 18 and still

in high school.

3. On December 8th, 2003, Petitioner came to my home in Geneseo at about 2 PM. She was driving her car and was accompanied by a friend of hers that I also knew named Mechal Fuoco, who lived in Mount Morris. Both Petitioner and Mechal were trying to find some marijuana. I had some and we all smoked some shortly after they arrived.

4. The marijuana had a very strong effect on the Petitioner. I thought she had become sick. She couldn't really talk with Mechal and me.

5. I decided to take advantage of this situation. I was planning to rob a marijuana dealer who was a student at SUNY Geneseo named Colin Edenfield. I was acquainted with Colin and knew where he lived over on Court Street in Geneseo near the SUNY campus. I believed he had several thousand dollars of cash in his house, Christmas was coming up and I had no money to buy gifts for my kids. But I needed help to perform the robbery because if I did it myself Colin would know me. Also, I didn't have a car but the Petitioner did, and she was in no condition to object.

6. There was this guy who lived in Mount Morris named Eric Harder. He was big, mean and stupid and he owed me money. I figured I could use him. I asked the Petitioner to give me a ride to Mount Morris to meet someone. I did not tell her or Mechal who it was or why I wanted to meet him. Mechal and the Petitioner agreed and we went to Mount Morris. Actually I don't really think Petitioner agreed in the sense that she was too out of it to respond. I think I drove because the Petitioner was out of it.

7. When we arrived in Mount Morris at Eric Harder's house I left the girls in the car and talked to Eric outside. He agreed to come along and got in the car. We then went back to my house in Geneseo to iron out the plan.

8. After some talking we were ready to go. At this point, Mechal knew what was up and wanted to help but the Petitioner was still out of it. I told Petitioner we were going to get some weed. She gave me some money to get the weed and I took it.

9. We then drove over to Colin's house on Court Street in Geneseo. Petitioner stayed in the car with me some distance away while Eric and Mechal went to rob Colin's. After a while Eric and Mechal returned and told me they could not find any money at Colin's. Petitioner was disappointed that they had not found any weed to buy. That's how out of it she was.

10. We all went back to my place because I had to return for a while to my girlfriend and our kids. I got dropped off and I think at this point the Petitioner took over driving. She probably shouldn't have been driving. She was still pretty much out of it. This must have been about 5 PM.

11. After that I was home. I was calling around to other people I knew trying to make arrangements to go back to Colin's because I knew he had money. I know I called the Petitioner's cell phone at least once during the evening of December 8th, and I learned at some point later on that she was in Mount Morris at Mechal's apartment. I think Eric Harder was there, too, but he was supposed to go to work around 11 PM in Leicester. Anyway, the police have my phone records with all the calls on it. They showed them to me.

12. Mechal had a live in boyfriend I knew by his nickname, "Cocoa". Cocoa also sold drugs. After I talked to him and Mechal, he wanted to get in on robbing Colin, too. We planned another trip to Colin's house, but it didn't happen until really late, like after midnight.

13. Very late on December 8th or in the early morning hours of December 9th, I made a second robbery

attempt on Colin. This time, Cocoa appeared at my house in Geneseo. He was driving Mechal's car, a gold colored Dodge Neon. Mechal was with him, and so was some Puerto Rican kid I didn't know. Also, the Petitioner was in the back seat. She was passed out, leaning up against the car door. I think Cocoa and Eric had tricked her into taking some heroin.

14. At this point I was getting kind of nervous because too many people were involved. But we went back over to Colin's, all of us. I stayed in the car with the Petitioner, who was passed out. Cocoa, Mechal and the Puerto Rican kid went to Colin's but they didn't come back with any money or drugs or anything.

15. I still wanted to get the money, but the others wanted to return to Mount Morris. I had called another guy I knew named Shaun Theriault, who lived in Nunda. And I called Harder at some point and told him to arrange to leave work for a while so he could help with the robbery, too.

16. The Petitioner was still out of it, and I knew from Mechal and Cocoa that her car was down in Mount Morris, parked near Mechal's apartment. So we went back to Mount Morris. Cocoa, Mechal and the Puerto Rican kid didn't come along after that.

17. The Petitioner was able to walk over to her car with me, but just barely. We got in. She started to drive but couldn't keep her head up. I told her she needed gas and she pulled into a gas station just a few yards from Mechal's apartment. She got out to pump the gas but she couldn't handle the nozzle. I got out and asked if she wanted me to pump the gas and drive, and she said okay. She got back in the car in the front passenger seat and went to sleep. It must have been after 2 AM.

18. With the Petitioner still being out of it, I was able to drive to Nunda to get Shaun. Shaun brought a shotgun. I told him he shouldn't bring it, but he said it

wasn't loaded and he was just going to scare people. Then I drove up to Leicester to get Harder. Then we went back over to Colin's. We got there about 4 AM. The Petitioner was still sleeping or passed out.

19. Petitioner and I stayed in the car, parked away from Colin's. I had brought some walkie-talkies to stay in touch with Eric and Shaun when they left to do the robbery, but I was worried about talking on it because I thought Colin would recognize my voice. Petitioner was still out of it, but I could make her talk and say something simple and then she would go back to sleep. So at one point I held the walkie-talkie in front of her mouth and told her to tell them to hurry up, and she did. I think she still thought it was the afternoon and we were trying to buy weed like I told her. I thought that was kind of funny. I wasn't meaning to involve her or get her in any trouble.

20. Eric and Shaun came back to the car and I drove Eric back to work. After I dropped him off I started to drive back to Geneseo. I know there's some statement to the Police from a guy named Bill Annis, who says he saw me drop Eric off but that the Petitioner was driving. I don't know why he said that. I think he's a friend of Eric Harder and he's lying for him.

21. The Petitioner woke up on the way back to Geneseo and complained that she was hungry. She was sort of annoyed. I went to the Wegman's in Geneseo and parked in the parking lot. I gave her her money back. Petitioner went in to buy some food. While she was in there Shaun took her cell phone and called Colin.

22. Over the next few weeks, I heard that the police were investigating the robbery. Lots of people knew it, like Mechal and Cocoa and Eric Harder. It had been on the news. I learned that the police went to question the Petitioner. I contacted her at some point and told her she didn't do anything and told her what to say. She didn't

know any better. She was out of it the whole time.

23. One of the things I heard was that the police were talking about a "kidnapping". I knew that was more serious than a robbery. I thought we were going to be accused of kidnapping the Petitioner. So eventually Shaun and Eric and I agreed we would say that the Petitioner was driving so they wouldn't accuse us of kidnapping her.

24. After I testified before the Grand Jury in October of 2004 I got a visit from Mr. Regan, Petitioner's attorney. He said he was there with the permission of my attorney, Mr. Cocuzzi. I had never really told anyone the whole story, including my own lawyer, but now it seemed really important and I told Mr. Regan everything. He asked me if he could disclose it and I told him yes. He asked me if I would come back to the Grand Jury and I said yes.

25. A few months after that Mr. Regan came back again. He said there might be a hearing and I might have to testify. I told him a little more about testifying before the Grand Jury, like that Mr. Moran, the prosecutor, was encouraging me and Shaun to implicate the Petitioner, saying we could help ourselves, telling us that she had ratted on us, so we should get her back and rat on her.

26. Also, at that time Mr. Regan told me that Eric Harder had gotten the Petitioner alone and had raped her. I didn't know anything about that until Mr. Regan told me, but I believe it. It's just like that scumbag. Like I said, he's big, mean and stupid.

27. I also want to say a few things Mr. Regan has asked me to say. I know them to be true but I do not know why Mr. Regan wants me to say them. First, nobody met with me at my house in Geneseo on the evening of December 8th, 2003 about any of these events. The only meeting at my house about any of this was in the afternoon of December 8th, just as I have said. Also, I do not know anyone named Stephanie Fox. No one by that name

participated in anything I was doing on December 8th and 9th, 2003. Also, there was lots of discussion between me and Mechal and Eric and Cocoa after December 9th and before I was arrested in January, weeks later. We were all trying to agree on what to say to foil the police investigation.

28. I never imagined that Moran would prosecute Petitioner like he has or that things would go this far. I thought when I told Mr. Regan everything that would be the end of it. If anyone wants me to testify to all this I will.

29. I am really, really sorry about all that has happened to the Petitioner. She was completely innocent of the whole thing.

Dated: May 3 , 2006

s/ADRIAN L. PAIGE

Sworn to before me this

3rd day of May, 2006

s/JOHN M. REGAN, JR.
Notary Public

_____

Notary Public

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

In the Matter of the Application of

SEPHORA K. DAVIS,

Petitioner

For a Judgment under Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

AFFIDAVIT

SEPHORA K. DAVIS, being duly sworn, deposes and says:

1. I am the Petitioner herein.

2. On December 8th, 2003 I was raped by an individual named Eric Harder. He is a very large man, about 6 foot 4 and three hundred pounds at the time. I am 5 foot 5 and a little over one hundred pounds. He raped me at his

apartment located at 79 North Main Street in the Village of Mount Morris, New York. I had just met him for the first time earlier that day through an acquaintance of mine, Adrian Paige.

3. Harder had lured me into his apartment with the promise of marijuana. He took me to his bedroom and began going through the drawers in his dresser. Instead of producing marijuana, he produced a knife. He put the knife to my throat and forced me to disrobe. Other than pulling down his pants he did not disrobe. He held the knife against me while he raped me. I could not resist him effectively because he was so large, and I was so afraid. I felt like I was being murdered.

4. After he raped me he said he was going to kill me. He still had the knife. I was terrified. I begged for my life. I had to promise him over and over again that I would never tell anyone that he had raped me. He then agreed not to kill me, but I was hysterical. He stayed with me, I think to make sure I would not tell anyone. He kept threatening to kill me if I ever did. He knew I had a younger sister, and he said he would kill her, too, if I ever told.

5. He then took me in my car to my girlfriend's home which was right around the corner on Trumbull Street in Mount Morris. Her name is Mechal Fuoco. Mechal was friends with Harder. I could not tell Mechal that Harder had raped me because he was right there and had said he would kill me and my little sister if I told. Mechal saw that I was extremely upset, though, and gave me a pill to calm me down.

6. Harder was still worried that I would tell. He told me he was going to find out where I lived so if I ever told he would come to my house in the night and kill me and my sister as we slept. He made me ask Mechal to drive me to my home in Avon in her car, since I was too upset to drive and had taken that pill. She agreed. Harder came, too. He

stayed in the car while Mechal and I went into my house. As a result, I knew that Harder knew where I and my family lived, and I was extremely frightened that he would carry out his threat.

7. We were only at my house briefly. After we left, we went back to Mechal's apartment in Mount Morris. Harder stayed with me and Mechal. After a while, Mechal's boyfriend came home. I was still extremely upset and frightened with Harder being there. At some point thereafter, I was offered some cocaine. I was not a regular cocaine user, but at that point I would have done anything to make myself feel better, so I sniffed what I was given. All I remember besides that is that Mechal's boyfriend left with Harder to take Harder to work. I remember the relief I felt when Harder was finally gone.

8. I was told later that the "cocaine" I was given was actually heroin. This makes sense to me, because I have a vague recollection that I could not keep my head up and that I felt very sick. I had never used heroin before or since.

9. The next thing I can actually remember was getting a strange phone call the next morning after I was home again. It was some guy saying: "I've got the money" or words to that effect. I did not know who it was or what he was talking about, but I remembered being with Adrian Paige the day before and thought he would know, so I called Adrian. He said not to worry about it.

10. About a week later the police came to my house. It was Eric Osganian of the Geneseo Police and some other officer I don't know. They talked to my sister first while I was upstairs. I knew they were asking about a robbery in Geneseo. I just went along with what my sister had told them. I didn't know anything about a robbery. I did not tell them Eric Harder raped me. Eric Harder had said he would kill me and my younger sister if I did, and I did not believe the police would do anything to protect me from

him. To me, the police were just as dangerous as Harder. A Mount Morris police officer named Dana Carson had aggressively harassed me sexually from the time I was 17 years old.

11. My parents hired a lawyer and everyone wanted me to make a statement to the police. I was told I would get immunity. I didn't think that would help after Eric Harder killed me and my sister. The police could not offer me immunity from that. I was having nightmares about it all the time.

12. On January 23rd, 2004 I was driving my car in Mount Morris. I had one passenger named Joey DioGuardi. Out of nowhere, I was suddenly surrounded by several police cars. They put their lights on me and I could see they were pointing guns at me. I looked at Ryan and asked what he had done. I couldn't believe it when they said they were there to arrest me. I was put up against my car and handcuffed, with guns pointed at my head. My parents later posted $25,000 bail and I was released.

13. After that I just tried to blot the whole thing out of my memory. I was constantly frightened. The only thing that seemed to help was drug use, and I began using heavily. That led to more legal trouble, and I also dropped out of high school.

14. In February of 2004 I learned I was pregnant. I knew it was Eric Harder's baby but I couldn't face that. It was just too horrible. I tried to pretend it wasn't happening. Finally I arranged to have an abortion in May of 2004.

15. My parents hired lawyers for me and I was told I would have to plead guilty to something and serve two years in state prison. I had not told my lawyers what had really happened. I had not told anyone. After a while it was like I didn't even remember it.

16. The last lawyer my parents hired was Mr. Regan, in June of 2004. He seemed nice, but all I really wanted at

that point was for him and everyone else to leave me alone. Mr. Regan wouldn't do that, and he became annoying. He kept asking me about things I didn't want to talk about and didn't really know very much about. There were times I swore at him and insulted him.

17. Mr. Regan said we had to testify before the Grand Jury. He prepared a written statement for me to read and reviewed it with me. Then, a day or two before he told me he had seen Adrian Paige in prison and had to change the statement all around. He got some medical records and after he showed them to me I remembered that I had been in the hospital on the morning of December 8th, 2003. When he was reviewing the new statement with me I was eating lunch. Mr. Regan asked me if anyone had sexually taken advantage of me on that night. I started crying and almost threw up. I couldn't answer him.

18. Shortly after that, we went in to testify before the Grand Jury. I know Mr. Regan wanted to testify, too, and he also wanted Adrian Paige to testify, but he told me those requests were refused. Then, later, he told me I had been indicted. After that he kept pestering me and I finally told him what Eric Harder had done to me. I was used to not thinking about it because that depressed and frightened me. Mr. Regan said we had to tell the District Attorney and the Court, but I got angry with him. I told him nobody would believe me and nobody would care.

19. After that, I tried to put all this out of my mind again. I continued to use drugs heavily, and was subsequently arrested on possession charges in Buffalo with my boyfriend. That led to my incarceration in the Erie County Jail and Monroe County Jail for about four months. While I was in jail I learned that I was pregnant. Upon my release, I was placed on Electronic Home Monitoring. I remain in that status today.

20. I have not used drugs or alcohol since before I learned I

was pregnant. I used to think there was nothing wrong with using marijuana. Almost everyone I knew used it. Now I see that it can involve me with dangerous people and can lead to terrible consequences for me and the people I care about. I am committed to never using illegal drugs again. I have been in Buffalo's "drug court" because of the charges against me there. I have successfully completed all my treatment and have been looking forward to "graduating".

21. I gave birth to my daughter on October 16th, 2005. She is happy and healthy. I would love to make plans for my life and hers, but I can't with these charges pending in Livingston County.

22. I have always known that I was innocent of the crimes I am charged with in Geneseo, but I have considered plea offers because no one can guarantee I won't be convicted, and if I am convicted I could receive as much as 25 years to life in prison. Mr. Regan opposes any plea, and has told me he will never allow me to plead guilty when I am innocent. He has told me that if I want to plead guilty to anything I will have to get another lawyer. But I do not want another lawyer. Mr. Regan has been my lawyer for almost two years now.

23. Mr. Regan has also told me that I cannot get a fair trial because the District Attorney and the Court refuse to address the fact that I was raped by Eric Harder. He says no jury will believe that a District Attorney would prosecute me under these circumstances or that any court would permit it, so they will reject our defense even though it is the truth.

24. Mr. Regan has also told me that the District Attorney is deliberately using perjury to prosecute me, and that the judge doesn't care. He said we had no choice but to go to a higher court with an "Article 78 Proceeding".

Dated: May 17, 2006

s/SEPHORA K. DAVIS

Sworn to before me this

17th day of May, 2006

s/John M. Regan, Jr.
Notary Public

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

In the Matter of the Application of

SEPHORA K. DAVIS,

Petitioner

For a Judgment under Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

AFFIRMATION

JOHN M. REGAN, JR., ESQ., pursuant to Rule 2106 of the CPLR, respectfully affirms to the Court:

1. I am the attorney for the Petitioner herein and I also represent her in the criminal action pending in Livingston County Court which is the subject of this application.

2. I began representing the Petitioner in June of

2004. At that time Petitioner was being prosecuted upon a Superior Court Information with the consent of her previous counsel. After my substitution into the matter, Respondent Moran decided to seek a superceding indictment.

3. I undertook to prepare the Petitioner to testify before the Grand Jury, but it became apparent that the Petitioner was unable to adequately account for herself during the events in question.

4. She was 19 years old and accused of being the "wheel man" for three older men - Eric Harder, Shaun Theriault, and Adrian Paige - in an armed robbery and "kidnapping" taking place in the Village of Geneseo at about 4 AM on December 9th, 2003, when she was 18. During the course of my interviews with her, she admitted to having been in the company of Paige and Theriault, but oddly denied any association at all with Harder, even though this was in conflict with the accounts of all three of the co-Defendants in at least one previous statement and their plea colloquys, which had occurred in April of 2004. In fact, at one point I directed her to write down an account of her relationships with the various characters involved and she did so. That paper is dated September 30th, 2004, a true and correct copy is annexed to the Petition as Exhibit "D", and in it she claims she does not know Eric Harder "...at ALL whatsoever." She had stated this and similar things to me repeatedly.

5. As the date for our appearance before the Grand Jury approached I was desperately seeking information from other sources in an effort to obtain a reliable account of the facts. Those efforts bore fruit in time - but just barely. I disclosed to the prosecutor my belief that the Petitioner had been raped, during the course of the events in question, on the day we appeared before the Grand Jury - October 13, 2004. I requested the opportunity to place

what I had learned before the Grand Jury, but was refused. If I had been dealing with a prosecutor who was acting in good faith, as is required by law, this entire proceeding could have been avoided.

6. It is important for the Court to understand that the Petitioner did not "cry rape" in the face of the underlying charges. Quite the contrary. She was denying any association at all with her rapist, for reasons that became clear when she finally admitted what had happened. However, evidence independent of any affirmative statement from her pointed to her having been raped, indicating both the perpetrator and the approximate time of day the rape occurred. The Petitioner merely filled in some details later that confirmed what other evidence already indicated. Unfortunately, by that time Respondent Moran had already obtained an "indictment".

THE COMPELLING CIRCUMSTANTIAL EVIDENCE THAT THE PETITIONER WAS RAPED BY ERIC HARDER ON DECEMBER 8TH, 2003

7. The first piece of this puzzle is the recantation of Adrian Paige. This initially occurred in my presence on October 9th and 11th, 2004, a few days prior to Petitioner's appearance before the Grand Jury and a few days after his own, and is embodied by and confirmed in Adrian Paige's affidavit of May 3rd, 2006, which is annexed to the Petition. Paige's recantation not only points to a loosely coordinated perjury scheme, but also establishes that Eric Harder is the only male that was likely to have been alone with the Petitioner on December 8th, 2003 prior to 7:14 PM.

8. The next item of evidence in the chain is a hospital record from Noyes Memorial Hospital in Dansville, New York from the morning of December 8th,

2003, annexed to the Petition as Exhibit "E". I obtained this record after Adrian Paige had told me, in the course of recanting, that the Petitioner had been "sick all day". The record indicates that the Petitioner was given a pregnancy test that morning, and that the result was NEGATIVE. The Petitioner was discharged from the hospital at noon on December 8th, 2003.

9. Next is the affidavit of Katrina Gerew, along with a confirming phone record, annexed to the Petition as Exhibit "F". The records of Petitioner's cell phone show two calls to Katrina Gerew on December 8th, 2003: one at 7:14 PM and the other at 11:26 PM. In her affidavit, Katrina Gerew confirms what the Petitioner told me - namely, that the Petitioner would call her around that time when Petitioner was anxious about being pregnant, because she knew Katrina Gerew was pregnant at that time and they were friendly.

10. This evidence, taken together, points to an act of sexual intercourse with the Petitioner taking place between noon on December 8th, 2003 and 7:14 PM, since there was no reason for the Petitioner to have been concerned about being pregnant that day after she had just received a negative pregnancy test at the hospital - from which she was discharged at noon - unless such an act of sexual intercourse had occurred. Based upon Adrian Paige's account of the events, the only male known to have been in Petitioner's company that could have been alone with her during that time span was Eric Harder.

11. In addition, on February 17th, 2004 an ultrasound confirmed that Petitioner had become pregnant around the time she was raped. A copy of that medical record is annexed to the Petition as Exhibit "G". Petitioner knew in her heart this was Harder's baby. She had an abortion on May 5th, 2004, her moral objections to the procedure notwithstanding.

12. Based upon this clear and convincing evidence, an act of sexual intercourse occurring between the Petitioner and Eric Harder on December 8th, 2003 after noon on that day but prior to 7:14 PM cannot be credibly denied.

13. Of course, the sexual intercourse could have been consensual or forced. However, the Court will note that Harder somewhat emphatically indicated before the Grand Jury in October, 2004 that he "didn't really know" the Petitioner (Exhibit "C" to the Petition, page 18, lines 3 to 6). If they had had consensual sexual intercourse in December, 2003, this testimony would obviously be perjury.

14. In addition, the Court should know that at the time of Grand Jury presentment, the Petitioner was willing to admit to illegal drug use, was willing to admit to consensual sexual activity with her then boyfriend and previous boyfriends, was willing to admit that she had been in the company of Adrian Paige and Shaun Theriault, who were ostensibly more culpable in the crimes than Eric Harder, and she was willing to admit to an abortion to which she was strongly morally opposed; yet she was strangely unwilling to admit having had anything "at all, whatsoever" to do with Eric Harder.

15. Based upon this compelling circumstantial evidence I submit that it is clear, to a moral certainty, that Eric Harder raped the Petitioner on December 8th, 2003 between approximately 5:00 and 7:00 PM. Neither the absence of sexual intercourse between them nor a consensual act of sexual intercourse is credible, as a matter of law. This is the case even without an affirmative allegation by the Petitioner, and indeed your affirmant came to the conclusion that the Petitioner was raped by Harder on the day in question without her ever telling me so, based upon this evidence. I am sure that the Grand Jury would

have reached the same conclusion if the prosecutor had the decency to let them see the evidence.

THE OVERWHELMING EVIDENCE THAT ERIC HARDER COMMITTED PERJURY BEFORE THE GRAND JURY

16. First, a recantation, and particularly a timely recantation, is the best indication of perjury, and one of the three witnesses who can testify as to the Petitioner's condition at the relevant time - Adrian Paige - recanted while the Grand Jury was still sitting. It is obvious that if Adrian Paige's recantation is true, then the other two such witnesses - Eric Harder and Shaun Theriault - committed perjury to the extent they implicated the Petitioner as a knowing participant in the crimes.

17. Adrian Paige's recantation, all by itself, casts sufficient doubt about the Grand Jury proceedings that the indictment should be dismissed without even requiring a hearing. But Adrian Paige's recantation is *not* the only indication of Eric Harder's perjury before the Grand Jury.

18. Again, a transcript of Eric Harder's testimony before the Grand Jury is annexed to the Petition as Exhibit "C".

19. I ask the Court to note that Harder, before the Grand Jury and in response to a question from Mr. Moran, claimed to have been in the company of an individual named Stephanie Fox, along with at least Adrian Paige and the Petitioner, during earlier activities related to the crimes charged (Exhibit "C", page 12 lines 3-4).

20. Harder's appearance before the Grand Jury occurred in October of 2004. The entire case against the Petitioner and the three co-Defendants, however, was the result of a statement Harder had given police more than eight months earlier - on January 23rd, 2004. A copy of that

statement is annexed to the Petition as Exhibit "H".

21. The Court will note that the January 23rd statement makes no mention of Stephanie Fox. She appears in Harder's account of the events for the first time when he testifies before the Grand Jury in October, 2004.

22. The Court will also note that January 23rd, 2004 is approximately 6 weeks after the crimes took place. The police had obtained a statement from Stephanie Fox much earlier - prior to Christmas of 2003, upon information and belief. Upon information and belief, that statement placed her with the Petitioner in Avon at the same time Harder's January 23rd statement placed himself with the Petitioner in Geneseo. The two towns are about 20 minutes apart by car.

23. Upon information and belief, Respondent Moran didn't realize this problem until it came time to present the matter to the Grand Jury. So intent was he on getting an indictment of the Petitioner that he disregarded this obvious indication of perjury by Harder and decided he would try, through Eric Harder's testimony, to place Stephanie Fox in Geneseo at the time in question with a group of people planning and carrying out robberies, including Eric Harder and Adrian Paige.

24. Again, the affidavit of Stephanie Fox is annexed to the Petition as Exhibit "B". She swears she does not even know Adrian Paige or Eric Harder.

25. Moreover, Stephanie Fox gave birth to a daughter in April of 2004. Thus, at the time she was supposed to be engaging in burglaries and robberies in December of 2003 with the Petitioner, Adrian Paige and Eric Harder, she was six months pregnant.

26. Respondent Moran's subsequent tactic to overcome the difficulty posed by Stephanie Fox's information was crude: he refused to reveal its existence to defense counsel and hoped that I would not find out about it independently. This is only one among several known

Brady violations by Respondent Moran in prosecuting this case. This conduct shows a conscious intent on his part to deceive the Court and to knowingly proceed with an indictment based upon perjured testimony.

27. Respondent Moran's tortured twisting and concealment of the evidence of Eric Harder's perjury would be laughable if it had not resulted in the continuing serious jeopardy the Petitioner now unjustly faces.

28. All of this was brought to the attention of Respondent Kohout by way of motions to dismiss the indictment. Respondent Kohout rendered a decision denying those motions, but apparently did not read Petitioner's submissions or failed to comprehend them. She has also refused to address Respondent Moran's Brady violations and ignored startling evidence of additional prosecutorial and police misconduct. I am utterly at a loss to explain Respondent Kohout's conduct in the underlying criminal matter.

THE OUTRAGEOUS POLICE MISCONDUCT BY OFFICER DANA CARSON WHICH RESULTED IN THE PETITIONER'S CHARGING AND ARREST

29. In December, 2003 Dana Carson was a police officer in the Mount Morris police department. Since October, 2002, he had been aggressively sexually harassing the Petitioner.

30. Attached to the Petition as Exhibit "I" are notes from the police investigation of the underlying criminal matter originally provided to your affirmant on October 25th, 2005. These notes establish that Dana Carson was the initial contact with Eric Harder - Petitioner's rapist - in generating the statement which resulted in the Petitioner's arrest, at gun point, on January 23rd, 2004.

31. Exhibit "J" to the Petition is Petitioner's

affidavit, filed with the Livingston County Court on April 7th, 2006. It was undisputed before Respondent Kohout. Together with Exhibit "I", it establishes that not only did Dana Carson arrange for Petitioner's arrest on the serious charges she now faces, but he also thereafter attempted to capitalize on Petitioner's legal jeopardy, *which he himself had initiated*, to pressure her into responding to his unwanted advances.

32. This unbelievably audacious and improper behavior was brought to the attention of Respondent Kohout through motion papers filed on April 7th, 2006 which were argued on April 19th, 2006. At oral argument, the following exchange took place, according to the transcript of the proceedings:

MR. REGAN: Then you have Dana Carson...I didn't know that he really had any meaningful role in the investigation until October 25th when I was provided -- of 2005 -- when I was provided with some notes indicating that he was the initial contact with Eric Harder. This is a very serious infection in the integrity of the system.

THE COURT: Why is that? The fact that they were romantically involved at one time, doesn't mean necessarily that this individual wasn't properly doing his job. I can't jump to that conclusion.

MR. REGAN: Well, there was, first of all, they were not romantically involved. What had happened was that although advances were made, the Defendant never responded and then --

THE COURT: Even so, even so, I can't make that jump, Mr. Regan. I, you know, that's just not

something that's a possibility.

33. I had cited a case to the Court, U.S. v. Cuervelo, 949 F.2d 559 (2nd Cir., 1991), where a criminal action was remanded to the trial court because of a sexual relationship between a police informant and the targeted Defendant. I was not asking Respondent Kohout to "jump". I was bringing to her attention an outrageous instance of misconduct by a police officer in bringing charges against a Defendant which obviously, at the very least, required inquiry and investigation, and had cited to her a case in support of exactly that proposition, for which there was no rebuttal from Respondent Moran.

34. I cannot fathom that Respondent Kohout or this Court would allow Petitioner's spurned police officer suitor to initiate criminal charges against her by way of taking a statement from her *rapist* without so much as seeking an explanation before continuing. Yet Respondent Kohout has done precisely this.

35. Even without considering the overwhelming evidence that the statement Carson took from Harder was false with respect to the Petitioner, the misconduct of Carson all by itself renders the arrest of the Petitioner unlawful. And the overwhelming evidence indicates that Harder's statement *was* false.

36. An unlawful arrest based upon police misconduct, perjury or false statements constitutes an "unreasonable seizure" in violation of the fourth amendment to the United States Constitution. Albright v. Oliver, 510 U.S. 266 (1994)(Opinion of Ginsburg, J., "circuit justice" for the Second Circuit in which we are situated)

37. In particular, the arrest of the Petitioner on January 23rd, 2004 - which was carried out at gun point

even though Petitioner had previously appeared voluntarily for police questioning with counsel - was a violent and brutal act against a then 18 year old high school girl with no criminal record, on top of the violent and brutal rape to which she had already been subjected. This Court is free to hold that such an arrest, prompted by despicable police misconduct in an unseemly collaboration with Petitioner's rapist, failed to confer jurisdiction over the person of the Petitioner. Lurie v. District Attorney of Kings County, 56 Misc.2d 68 (Supreme Court, Kings County, 1968)

CONCLUSION

38. There must be a point at which a criminal proceeding is so corrupted a prosecutor will not be allowed to put a person on trial. Here we have a police officer, who resented the Petitioner for sexually rejecting him, obtaining a false statement from her rapist to initiate charges against her. She is then violently arrested with no justification. As the evidence mounts that the Petitioner is not only falsely accused, but is the biggest victim in the whole affair, the prosecutor encourages and presents perjury before the Grand Jury, and then hides the evidence that perjury has been committed so that he can obtain an "indictment". He refuses to prosecute Petitioner's rapist unless Petitioner pleads guilty as he demands. The trial court, incredibly, refuses to stop this madness or even inquire into it, other than by putting the Petitioner in the dock for a trial in which she - and not the evil men who are raping and prosecuting her - is in extreme jeopardy.

39. Eric Harder, who Respondent Moran likes to refer to as "a big, dumb farm kid" has already raped the Petitioner and made a mockery of the Mount Morris and Geneseo Police Departments, the Livingston County

District Attorney's Office, and two judges of the Livingston County Court. I am merely asking the Court to stop him from making a mockery of this Court as well. I remain shocked that I have to make this request.

Dated: May 17, 2006

s/JOHN M. REGAN, JR.

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

SEPHORA K. DAVIS,

Petitioner

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

VERIFIED ANSWER

Respondent, Thomas E. Moran ("Respondent"), by its attorneys, Underberg & Kessler, LLP, as and for its Verified Answer states as follows:

1. Respondent denies the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the Petition.

2. Respondent lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 13 of the Petition, and therefore denies the allegations.

WHEREFORE, Respondent Thomas E. Moran respectfully requests judgment dismissing the Petition, awarding Respondent the costs and disbursements of this proceeding, and granting such other and further relief as this Court shall deem just, equitable and proper.

Dated: Rochester, New York
August 31, 2006

UNDERBERG & KESSLER, LLP

s/James A. Coniglio, Esq., of Counsel
James V. D'Anza, of Counsel
Attorneys for Respondent
Thomas E. Moran, Esq.
300 Bausch & Lomb Place
Rochester, NY 14604
(585) 258-2800

TO:

REGAN & REGAN
John M. Regan, Jr., Esq.
Attorneys for Petitioner
29 Hoyt Place
Rochester, NY 14610

VERIFICATION

THOMAS E. MORAN, ESQ., being duly sworn, deposes and says that deponent is one of the respondents in the within action; that deponent has read the foregoing Verified Answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters deponent believes it to be true.

s/Thomas E. Moran

Sworn to before me this
1st day of September, 2006

s/James A. Coniglio
Notary Public

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

SEPHORA K. DAVIS,

Petitioner

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF MONROE) ss.

THOMAS E. MORAN, being duly sworn, deposes and states as follows:

1. Your deponent is a Respondent in the above-referenced action, and the Livingston County District Attorney on behalf of the People of the State of New York.

2. The statements herein are made on personal knowledge.

3. That your deponent presided over the grand jury proceedings that are the subject of this Article 78 action.

4. The record for this proceeding are the grand jury minutes, which may not be disclosed due to the secret nature of grand jury proceedings.

5. The allegations submitted in the Petition are confounded by law and undermine the prosecutorial discretion which is prescribed to me by Article XIII of the Constitution of the State of New York.

6. The Petition merely raises questions of fact which may or may not rise to the level of affirmative defenses against the indictment. As such, they are merely issues to be raised at trial and as a matter of law, are insufficient to sustain a petition for prohibition.

7. Your deponent's role as public prosecutor at grand jury proceedings is an investigatory one, which is executive in nature and thus, cannot be the object of a writ of prohibition. See, McGinley v. Hynes, 51 NY2d 116 (1980)

8. Your deponent submits that the proper procedure for petitioner's requests for review of the evidence are motions, presentation of witnesses and evidence, and through cross-examination at the pretrial and trial stages of the pending criminal action. There is no basis in law for having such factual issues and evidentiary issues disposed of in an Article 78 proceeding.

9. These traditional remedies provide "adequate protection to those who feel themselves aggrieved by the conduct of a public prosecutor". Hynes at 126

10. My role as public prosecutor at grand jury proceedings is strictly as "legal advisor" pursuant to CPL 190.25(6): "the grand jury is the exclusive judge of the facts with respect to any matter before it." CPL 190.25(5)

11. Your deponent states that in the present case, I acted as legal advisor to the grand jury and presented evidence, subject to, and conforming with, Article 190 of the New York Criminal Procedure Law.

12. Subsequent to the presentation of evidence, the grand jury voted to indict petitioner for the criminal offenses indicated in the subject petition.

13. The petitioner is no facing trial at which time her guilt will have to be proven beyond a reasonable doubt on each and every charge for her to be convicted of any criminal offense.

14. At that trial, petitioner will have the opportunity to challenge all the evidence presented against her and present evidence in her own behalf.

15. The trial is the forum by which the petitioner will have the opportunity to present the evidence and bring the challenges she wrongly brings to this Article 78 proceeding.

16. Furthermore, your deponent challenges the standing of Mr. Regan to bring this action as he has withdrawn as counsel for the Petitioner (see attached Exhibit A, p.6, lines 6-16), in the pending action in Livingston County Court, and petitioner's current counsel has not raised the pendency of this Article 78 proceeding in any respect.

17. In conclusion, your deponent submits that this petition for prohibition is improper in that it requests the action of denying the People of the State of New York the opportunity to have this matter decided by a full trial of the facts. It further would subvert the lawful action of the grand jury which, to date, was the sole fact finding body that observed the evidence in support of the indictment.

s/Thomas E. Moran, Esq.

Sworn to before me this
1st day of September, 2006

s/James A. Coniglio
Notary Public

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

In the Matter of the Application of

SEPHORA K. DAVIS,

Petitioner

For a Judgment under Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE, that upon the Verified Petition of the Petitioner dated May 17, 2006, with affidavits and exhibits annexed thereto; and upon the Verified Answer of Respondent Moran, verified the 1st day of September, 2006, with exhibit annexed thereto; and upon the affirmation of JOHN M. REGAN, JR., ESQ. dated

September 20th, 2006, submitted herewith; the affidavit of JACKIE RODGERS sworn to the 19th day of September, 2006; and the Exhibits attached hereto and submitted herewith, the undersigned will move this Court, at a regular term thereof, to be held at the Delores M. Denman Courthouse, 50 East Ave., Rochester, New York, on the **2nd day of October, 2006, at 10 o'clock in the forenoon of that day**, or as soon thereafter as counsel may be heard, for an Order granting the following relief:

1. Pursuant to CPLR 409(b), a summary determination granting Prohibition in favor of the Petitioner upon the pleadings, papers and submissions, on the ground that the Answer and submissions of Respondent Moran raise no issue of fact or objection of law to the Petition; and on the further ground that the continued prosecution of the Petitioner brings disgrace upon our system of justice, violates universally held standards of common decency and civilized behavior, and may constitute a continuing crime against humanity in violation of international law; and

2. Pursuant to CPLR 7804(h), the appointment of a referee to conduct a trial "forthwith" on the issue of money damages deemed "incidental" to the harm caused by Respondent Moran's wrongful prosecution of the Petitioner, in accordance with CPLR 7806, to include: attorney's fees incurred in defending herself and bringing this proceeding; money damages for the willful deprivation and violation of Petitioner's liberty and rights under the constitutions of the United States, New York State; and for tortious injury deliberately inflicted; and any other appropriate relief; or, in the alternative

3. Pursuant to CPLR 7805, a stay of further proceedings in Livingston County Court against the Petitioner pending briefing, argument and decision in accordance with this Court's scheduling order dated September 5, 2006, or upon any modification of that order,

should the Court decide that such briefing and argument are necessary or desirable.

TOGETHER with such other, further and different relief which to the Court shall seem just, equitable and proper.

TAKE FURTHER NOTICE, that in accordance with CPLR 2214(b), answering affidavits, if any, are to be served upon the undersigned no later than seven (7) days before the return date of this motion.

Dated: September 20, 2006

Yours, etc.

REGAN & REGAN, Attorneys
John M. Regan, Jr., Esq., of counsel
Attorneys for the Petitioner
SEPHORA K. DAVIS
Office and Post Office Address
29 Hoyt Place
Rochester, NY 14610

585.546.8880

TO:

UNDERBERG & KESSLER, LLP
300 Bausch & Lomb Place
Rochester, NY 14604
Attn: James V. D'Anza, Esq.

Hon. Elliot Spitzer
NYS Attorney General
144 Exchange Blvd.
Rochester, NY 14614

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

In the Matter of the Application of

SEPHORA K. DAVIS,

Petitioner

For a Judgment under Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

AFFIRMATION

1. I am the attorney for the Petitioner herein, and I make this affirmation in support of Petitioner's motion for judgment on the pleadings under CPLR 409(b), and other relief requested in Petitioner's Notice of Motion dated September 20, 2006.

I. THE COURT SHOULD GRANT JUDGMENT ON

THE PLEADINGS AS THERE ARE NO ISSSUES OF FACT AND NO VALID OBJECTION OF LAW RAISED BY RESPONDENT MORAN'S ANSWER

2. Pursuant to this Court's order of August 16, 2006, Respondent Moran submitted an answer to the Petition herein on September 5, 2006. It consisted of a general denial of the allegations of the Petition and an affidavit of Mr. Moran, with an attached exhibit consisting of a transcript of a court appearance in the underlying matter which took place on July 6th, 2006. Other than what appears to be a challenge to the facial sufficiency of the Petition, and a brief quarrel with your affirmant's "standing" to act as counsel in this proceeding - a quarrel that appears to have no legal justification whatever - Respondent Moran's pleading raises no legal objection to the Petition. Moreover, it is well settled that in a special proceeding a general denial, and the absence of affidavits based upon personal knowledge disputing in detail the allegations made in a Petition, fail to present the Court with any issue of fact. CPLR 7804(d)(answer must state "pertinent and material facts showing the grounds of the Respondent's action complained of"); Howell v. Benson, 105 Misc.2d 757 (Albany County, 1980)(general denial of allegations of Petition not sufficient to raise issue of fact) An attorney's affidavit not based upon personal knowledge has no probative value. Zuckerman v. City of New York, 49 NY2d 557 (1980); Werdein v. Johnson, 221 AD2d 899 (4th Dept., 1995); Deronde Products v. Steve General Contractor, Inc., 302 AD2d 989 (4th Dept., 2003) Where no evidentiary dispute is raised, the Court must make a summary determination. CPLR 409(b); Matter of 22 Park Place Co-op v. County of Nassau BOA, 102 AD2d 893 (2nd Dept., 1984)

3. More specifically, there is no affidavit from Eric

Harder. There is no affidavit from Dana Carson. Other than the transcript of the July 6th appearance, there is no documentary proof. Respondent Moran apparently also failed to provide any part of the record of the proceedings under review in accordance with CPLR 7804(e), and falsely implied that the record would consist only of the Grand Jury minutes underpinning the indictment; whereas in fact there is an extensive record filed in the Livingston County Clerk's office consisting of many motions, orders, affidavits and documentary proof. In addition, Respondent Moran appears to take the position that because of Grand Jury secrecy rules, he will not even provide the Grand Jury minutes to this Court, even though that is routinely done in appeals where review of the Grand Jury proceedings are necessary [see, e.g., 22 NYCRR 1000.7(g)]. Thus, it appears that this Court has no record upon which to consider the issues herein other than that provided by the Petitioner with the Petition and herewith, and the embarrassingly meager pleading of Respondent Moran.

4. Accordingly, the Court must proceed to consider the merits of this proceeding with the following facts, among others, established as a matter of law:

a. Eric Harder raped the Petitioner at knife point roughly between 5 and 7 PM on December 8th, 2003.

b. Harder threatened to kill the Petitioner and her younger sister if she ever told anyone what he had done.

c. Petitioner was subsequently drugged and incapacitated as Harder and two other accomplices used Petitioner's car and cell phone in the course of carrying out the crimes for which Petitioner is being prosecuted, which prosecution this proceeding seeks to prohibit.

d. In January 2004, Harder - Petitioner's rapist -

collaborated with then Mount Morris Police officer Dana Carson - a frustrated and angry suitor of the Petitioner - to falsely implicate the Petitioner as a willing participant in the crimes.

e. Harder and Carson's collaboration resulted in the violent arrest of the Petitioner.

f. Petitioner was subsequently indicted as a result of a Grand Jury proceeding which was infected with perjury from Harder and others, where Respondent Moran was aware of the perjury and actually prompted certain witnesses to implicate the Petitioner as they waited to testify.

5. The Hynes case, cited by Respondent Moran in his affidavit, is not applicable here. Hynes involved an attempt to prohibit a Special Prosecutor from presenting a criminal case to a Grand Jury. Making a distinction between a prosecutor's "investigative" and "accusatory" functions, the Court considered the question of whether, on the facts of that case, the actions of the prosecutor sought to be prohibited were investigative, and therefore not subject to prohibition; or accusatory, thus quasi-judicial and subject to prohibition. 51 NY2d at 123, 124 A close reading of Hynes shows there is no question that *after* an indictment, the public prosecutor is engaged in accusatory, quasi-judicial conduct and that prohibition will lie, albeit only in extraordinary circumstances, such as the those presented herewith.

6. In the case at bar, the Petitioner is obviously not seeking to prohibit Respondent Moran from presenting any matter to a Grand Jury; in fact, the Petitioner willingly appeared before the Grand Jury in the underlying criminal matter without seeking collateral relief, unlike the

Petitioner in Hynes. Rather, the Petition alleges an utter corruption of the Grand Jury process by Respondent Moran which resulted in an illegal indictment, and seeks to prohibit his plainly accusatory, quasi-judicial conduct in prosecuting Petitioner based upon such an indictment.

II. FAILURE TO GRANT JUDGMENT TO THE PETITIONER WILL BRING FURTHER DISGRACE TO OUR SYSTEM OF JUSTICE

7. Respondent Moran, by the nature of his answering pleading and the paucity of his accompanying evidence, is daring this Court to hold that a prosecution can proceed in the face of the aforementioned admitted facts. In effect, he asks the Court to rule that outside of a double jeopardy claim, his prosecutorial discretion is absolute and untouchable in an Article 78 proceeding in the nature of Prohibition, no matter how unjust its objectives or how corrupt his methods and intentions. He bids the Court to hold that the arrest of the Petitioner, grounded in what must be among the most grotesque instances of official misconduct imaginable - a spurned and resentful police officer teaming up with a young woman's rapist to further injure and oppress her, this time with the formidable criminal justice apparatus of the state - nevertheless legitimately confers jurisdiction over her person upon her arrest; and that an indictment against her obtained through the knowing use of perjured testimony also confers jurisdiction upon a superior criminal court so as to put the accused through the ordeal of a trial.

8. It is respectfully submitted that this Court now faces at least one issue perhaps more disturbing than the question of whether one criminal prosecution can proceed:

namely, the fitness of Mr. Moran to function as a District Attorney, to be entrusted with the potentially destructive power of conducting criminal prosecutions, where this Court can no longer have any assurance that such a potentially destructive power is being responsibly employed.

A. Contrary to his representations to this Court, Respondent Moran is attempting to conceal and suppress the evidence that Eric Harder raped the Petitioner

9. Our criminal justice adjudication process assumes as axiomatic that a prosecutor brings an action in good faith, that it is predicated upon an honest and reasonably diligent investigation, and that evidence tending to exonerate an accused person will have been at least fairly considered before subjecting that person to the ignominy and notoriety of a full fledged criminal prosecution and trial.

10. Respondent Moran does not dispute that he was aware of the allegation that the Petitioner had been raped by one of her alleged accomplices as early as October 13, 2004 - the day Petitioner testified before the Grand Jury. He also fails to contest the palpably obscene impropriety of Officer Carson's extensive involvement with the investigation of the underlying crimes for which he is prosecuting her, or the factual allegations establishing that impropriety. He simply asserts - again falsely - that these are issues to be resolved at a trial *of the Petitioner*.

11. In fact, Respondent Moran's office has already moved in Livingston County Court to have the Petitioner *precluded* from offering evidence of her rape at the hands of Eric Harder. The Notice of Motion filed in Livingston County Court demanding that relief is annexed hereto as Exhibit "A".

B. Respondent Moran has refused to investigate or prosecute the rape, and has willfully blocked Petitioner's effort to report the rape to law enforcement

12. As indicated in the Petition, Respondent Moran has refused to prosecute Petitioner's rapist in favor of prosecuting her. The Court should be aware that since the filing of the Petition Respondent Moran has gone one step further, and actively blocked an official investigation of Eric Harder's rape of the Petitioner.

13. After the substitution of Donald Thompson, Esq., as attorney for the Petitioner in the underlying criminal matter, Mr. Thompson requested that your affirmant arrange for the rape to be reported to law enforcement for investigation and potential prosecution. Your affirmant contacted New York State Police investigator James Newell, who initially agreed to meet with the Petitioner, take a report and commence an investigation.

14. Investigator Newell subsequently called your affirmant and canceled the meeting with the Petitioner, stating that he had talked to Respondent Moran and that as a result of that conversation he was no longer willing to undertake the matter.

15. Respondent Moran's office had previously questioned through local news outlets the credibility and character of the Petitioner (copy annexed hereto as Exhibit "B"), arguing that she had not reported her rape to law enforcement. This was a blatant misrepresentation, since she has long since reported the rape to the chief law enforcement officer with jurisdiction over the crime - Respondent Moran himself. Beyond that, as noted above, his office moved to preclude the Petitioner from offering any evidence concerning her rape at the trial Respondent Moran hopes to inflict upon her, citing her supposed failure

to report the rape to law enforcement. He then blocked her very effort to report the rape to the State Police.

16. This Court cannot tolerate such flagrant duplicity from a public prosecutor.

C. Respondent Moran is using his position and prosecutorial "discretion" to conceal other violent acts by Eric Harder.

17. Submitted herewith is a affidavit from Jackie Rodgers, a young woman who was an eye witness to Eric Harder striking her boyfriend with a metal bar. This occurred in July of this year, after the Petition in this matter was filed.

18. Your affirmant checked with the Mount Morris Village Court. The court clerk reported that Mr. Harder has not been charged in connection with this serious incident, despite Ms. Rodgers' eye witness account and her report to the Mount Morris Police. Apparently, Respondent Moran exercised his discretion in favor of not prosecuting Mr. Harder, who remains - as Respondent Moran is undoubtedly acutely aware - one of his most important witnesses against the Petitioner.

19. Upon information and belief, Eric Harder already has an extensive history of abusive behavior towards people and property, including criminal mischief and two separate harassment charges in 2000 in Mount Morris. Of course, Harder was also convicted of Robbery in connection with the incident in which the Petitioner is charged, dating from 2003. And then there is the forcible rape at knife point against the Petitioner, although Respondent Moran continues to obstruct the reporting of that rape and will apparently never prosecute it.

20. The Court should hesitate to call this conduct an exercise of prosecutorial "discretion": coddling to the

point of aiding and abetting a large and demonstrably violent man, while turning the full weight of the state's prosecutorial power against that man's victim, in an obscene effort to obtain a criminal conviction and imprisonment of the latter. This decision calls into question not just Respondent Moran's judgment, but his fitness for the office he holds.

D. Respondent Moran's true position is that it is irrelevant that Eric Harder raped the Petitioner at knife point.

21. Had Respondent Moran provided the record from the Livingston County Clerk's office as required by CPLR 7804(e), the Court would learn that in December, 2004, in his first official response to the evidence that Petitioner had been raped by Eric Harder, Respondent Moran stated the following: "Nonetheless, even if defendant [Petitioner] was raped, what grounds would lie to dismiss the instant Indictment." A copy of Respondent Moran's Answering Affirmation dated December 28, 2004 is annexed hereto as Exhibit "C".

22. Subsequently, after a long delay due to issues involving Petitioner's competency to stand trial, motions were argued in Livingston County Court before Hon. Ronald Cicoria, who presided at that time. Adopting Respondent Moran's approach uncritically, Judge Cicoria issued a written decision dated September 20, 2005 in which the word "rape" does not even appear, although he supposedly considered the question of whether there was some "compelling factor" warranting dismissal of the indictment in furtherance of justice under CPL 210.40. A copy of Judge Cicoria's decision is annexed hereto as Exhibit "D".

23. Tellingly, in this very proceeding the word

"rape" does not appear in Respondent Moran's Answer or affidavit filed September 5th, 2006. Perhaps at some level even Respondent Moran is ashamed that he is prosecuting the Petitioner, and this further accounts for his reluctance to answer the Petition (this Court ordered him to do so *twice* before he did) and his refusal to provide the record of the proceedings under review in compliance with CPLR 7804(e).

III. PROHIBITION IS THE ONLY JUST REMEDY FOR THE PETITIONER

24. In any event, a trial of the Petitioner is not the proper forum for considering any of the issues raised in the Petition; and to the extent that they can be and have been considered on motions before the trial judge, this Court must consider how thoroughly trial judges have been discouraged from acceding to a criminal defendant's objections and requests for dismissal on motions. A ruling from a trial judge dismissing an indictment, or any portion thereof, is the subject of an expedited appeal (22 NYCRR 1000.7) where a district attorney has a far, far greater chance of prevailing than other litigants. Trial judges are not oblivious to this reality, and dismissals of indictments by trial judges are exceedingly rare. Amplifying this effect in the present case, this Court should take judicial notice that the trial judge here, Judge Kohout, is a Monroe County Family Court Judge who has been sitting as a Livingston County Court Judge on criminal matters for administrative reasons.

25. This is not to suggest that dismissals of indictments should be common. But where the good faith and integrity of the prosecution and even the prosecutor are plainly absent - as Respondent Moran's answer makes clear in the case at bar - this Court should not hesitate to hold,

clearly and publicly, that an indictment not only can be dismissed, it *must* be dismissed, in lieu whereof this Court will entertain collateral review by way of an Article 78 proceeding to halt a prosecution conducted pursuant to it.

26. This is perhaps best illustrated by considering the only alternative the Court has otherwise: holding that collateral review will not be available no matter how corrupted the prosecution and the prosecutor. This holding will be carte blanche to the most dishonest, brutal and brazenly corrupt police and prosecutors, those who successfully employ deceit and perjury, misrepresent facts to courts, manipulate or intimidate witnesses, threaten or intimidate opposing counsel and perhaps even trial judges. The Court should be alarmed that some conduct of this nature has not only been alleged, but actually admitted as a matter of law in this proceeding; it indicates that it is well past time for this Court to clearly repudiate and cancel the blank check those such as Respondent Moran and Officer Carson apparently believe they have.

27. The Court should further recognize the inadequacy of effectively placing the burden of litigating these issues in a case such as this upon a criminal defendant at her own trial, where she faces extreme jeopardy by virtue of a malevolent collaboration between her rapist and the state, and where the actual wrongdoers - her rapist, and the police and prosecutors who have wrongfully placed her in that position - face no such concern.

28. In fact, simply to defend herself the Petitioner has been forced to publicly place in issue excruciatingly personal and intimate facts, such as her medical and psychological condition, her sexual habits and practices, and her abortion as a result Eric Harder's rape. Thus, as a result of Respondent Moran's exercise of his "discretion", the state has become the willing instrument of a rapist to further torment and publicly humiliate his victim for nearly

three years. The Petitioner should not have to endure one more day of it, and each day it continues brings further disgrace to our criminal justice system.

IV. THE RAPE AND SUBSEQUENT PROSECUTION OF THE PETITIONER MAY CONSTITUTE A CRIME AGAINST HUMANITY IN VIOLATION OF INTERNATIONAL LAW

29. The conduct of Respondent Moran raises the question of whether his efforts to convict the Petitioner, particularly since he is using Eric Harder's testimony, amounts to state sanctioned rape in violation of international law.

30. There is reason to believe that the sexual exploitation of young women by police in the Village of Mount Morris, where Petitioner was raped, has been a widespread phenomenon involving not just the Petitioner, but many young women; and upon information and belief, Eric Harder, the Petitioner's rapist, has frequently served as a police informant - an agent of the Mount Morris Police and Respondent Moran.

31. The previous two chiefs of the Mount Morris Police Department were forced to resign or were removed amid allegations of sexual misconduct, beginning in late 2004. Attached hereto as Exhibit "E" is a true and correct copy of a newspaper article appearing in the Livingston County News on December 4, 2004, carrying a quote from a Mount Morris Village Board member, Jon LaDelfa, indicating that sexual misconduct in the Mount Morris Police Department had been distressingly widespread.

32. The nature and extent of the police misconduct is kept secret by the Village Board, which reviews formal allegations against police officers in "executive session".

However, upon information and belief, Mount Morris Police Chief Sherman Yates resigned in the fall of 2004 over allegations of sexual misconduct. He was replaced by Officer Rick Albanese, who was suspended in February of 2006 and then terminated, after he reportedly was caught exposing himself and making sexual demands of female workers at area massage parlors. Albanese in turn was replaced by Officer Kenneth Mignemi, who was suspended in 2004 over allegations of his own sexual misconduct. Mignemi was returned to duty and the allegations were ruled "unfounded", but Mr. LaDelfa has indicated that the ruling was the result of Mignemi securing a recantation from his accusers by threat and intimidation.

33. In view of the foregoing, your affirmant has had several conversations with Mr. LaDelfa, who by virtue of his status as a Village Board member is privy to the information disclosed in executive session. Mr. LaDelfa has indicated that sexual exploitation of females by way of abused police authority has indeed been a widespread problem in Mount Morris. He declined to provide an affidavit for this application, citing liability concerns for the Village; however, he indicated if he was subpoenaed he would appear and give truthful testimony, if the Court should so require.

34. The Court's attention is invited to the Rome Statute of the International Criminal Court, as implemented in July, 2002. Article 7 thereof concerns "crimes against humanity", Article 7(1)(g)-1 defines the crime against humanity of rape, and Article 7(1)(g)-6 defines the crime against humanity of sexual violence. Copies of relevant portions of the statute involved are annexed hereto as Exhibit "F".

35. A rape qualifies as a "crime against humanity" when it is "...committed as part of a widespread or systematic attack directed against a civilian population..."

which is understood to mean "...a course of conduct involving the multiple commission of acts...against *any* civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack." See, Article 7 Introduction, paragraph 3 (Exhibit "F")(emphasis added)

36. The Rome Statute has not been ratified by the United States and thus does not have the force of law. Nevertheless, this Court should be disturbed at the prospect that the situation with the Mount Morris Police and the Livingston County District Attorney, particularly with respect to the rape and prosecution of the Petitioner and the sexual exploitation of other young women - who would seem to constitute "a civilian population" - readily meets the criteria for what much of the world has agreed are among the most heinous offenses.

37. It is respectfully submitted that the Court should regard any substantial allegation of "crimes against humanity" - even though international law may not apply - as an incipient indication that the rule of law in an area under this Court's jurisdiction is in jeopardy. Moreover, crimes against humanity aside, the simple fact that the prosecution against the Petitioner has continued this far, for this long, in the face of the now undisputed allegations of the Petition is a symptom of profound moral degeneration afflicting the Mount Morris Police Department, the Livingston County District Attorney's Office, and even the Livingston County Court.

38. Law and morality are not exactly the same thing. But the law cannot be entirely divorced from even the most basic and internationally recognized principles of common decency; the result can only be a form of barbarism that retains merely the trappings of a civilization guided by the rule of law.

V. UPON GRANTING PROHIBITION, THE COURT SHOULD ORDER A TRIAL ON THE ISSUE OF DAMAGES DUE THE PETITIONER

39. The issue of damages obtainable in an Article 78 proceeding is recondite. CPLR 7806 empowers a court to award such damages as are "incidental" to the primary relief sought. 40. The Court of Appeals has indicated that the question of whether damages are incidental largely depends on the facts of the case. Gross v. Perales, 72 NY2d 231 (1988); see also, LaDuke v. Lyons, 250 AD2d 969 (3rd Dept., 1998)

41. This constitutes a potential pitfall for a Petitioner: if she fails to request damages in an Article 78 proceeding, and those damages are later determined to be "incidental" to the relief sought, a subsequent action for damages will be precluded as *res judicata*. Antonsen v. Ward, 943 F.2d 198 (2nd Cir., 1991); see also, McKinney's Practice Commentary C7806:1

42. It appears settled that attorney's fees are "incidental". On the other hand, pain, suffering and punitive damages are not incidental with respect to an Article 78 proceeding seeking reinstatement and back pay. Vega v. NYS University Board of Trustees, 67 F.Supp 2nd 324 (SDNY, 1999) Then again, condominium owners who brought an Article 78 proceeding in which they made allegations of tortious conduct by condominium board members, could recover tort damages as incidental. Y&O Holdings v. Board of Managers of Executive Plaza Condominiums, 278 AD2d 173 (1st Dept., 2000)

43. In light of the foregoing, I respectfully request the Court to consider the following:

The initiation of a criminal prosecution, regardless of whether it prompts an arrest, immediately

produces "a wrenching disruption of everyday life." Young v. United States ex rel. Vuitton et Fils, 481 U.S. 787, 814 (1987). Every prosecution, like every arrest, "is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." United States v. Marion, 404 U.S. 307, 320 (1971). Albright v. Oliver, 510 U.S. 266 (1994)(Stevens, J., dissenting)

44. If "every" prosecution inflicts tortious injuries, as Justice Stevens states, then it would seem the award of tort damages in the case of Prohibition, where a wrongful prosecution has necessarily been adjudicated, would be incidental to the primary relief requested and available in this proceeding, along with attorney's fees, costs and disbursements.

VI. IF THE COURT DOES NOT EXERCISE ITS DISCRETION AWARDING JUDGMENT TO THE PETITIONER UPON THIS APPLICATION, THE COURT SHOULD GRANT A STAY OF THE PROCEEDINGS UNDER REVIEW IN ACCORDANCE WITH CPLR 7805

45. Under this Court's most recent scheduling order dated September 5th, 2006 (Exhibit "G") this proceeding is scheduled for submission of briefs and set for oral argument the week of November 27, 2006. Petitioner's trial in Livingston County Court is currently set for December 4th, 2006.

46. This is an original proceeding in which this Court functions as a trial court. As is apparent from this

application, there are evidentiary matters that must be brought to the Court's attention that have occurred since the filing of the Petition that perhaps render the usual appellate procedure of briefing and argument upon a settled record inappropriate; thus the Court may be compelled to decide this proceeding upon motions and/or a trial.

47. Your affirmant respectfully suggests that the extraordinary circumstances of this proceeding may warrant a departure from the understandably fixed rule that the Court will not hear oral argument on motions under 22 NYCRR 1000.13(a)(6), should the Court desire argument prior to rendering a decision.

48. It is respectfully submitted that the orderly administration of justice requires Petitioner's claims to be adjudicated in one forum - not two simultaneously. This consideration argues strongly in favor of granting a stay.

49. Petitioner has requested, and been denied, a stay under CPLR 7805 twice before: by Notice of Motion dated June 7, 2006, and by an Order to Show Cause directed to Justice Kehoe that was returned unsigned and not docketed. However, both of those applications were made before issue was joined. It is submitted that Respondent Moran's submission of an Answer provides a ground for renewal of this request.

50. Just to be clear, the relief requested under this heading is made in the alternative only. Petitioner believes a judgment of Prohibition should be granted outright upon this application, whether or not the Court hears oral argument.

Affirmed under penalty of perjury this 20th day of September, 2006 in accordance with CPLR 2106

s/JOHN M. REGAN, JR.

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

SEPHORA K. DAVIS,

Petitioner

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

NOTICE OF CROSS-MOTION

SIRS:

PLEASE TAKE NOTICE, that the Respondent, Thomas E. Moran, through his attorneys, Underberg & Kessler, LLP and upon the affidavit of James V. D'Anza, Esq., annexed hereto, will move this Court at a regular term thereof to be held at the Delores M. Denman Courthouse, 50 Eat Avenue, Rochester, New York, on the 2nd day of October, 2006 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard for an Order granting the following relief:

1. For a summary determination pursuant to CPLR 409(b) denying prohibition on the grounds that the Petition, its supporting documentation, the Notice of Motion of Petitioner, dated September 20, 2006 and its supporting

affidavit fail to set forth a legal or factual basis for prohibition;

2. Striking the affidavit of Jackie Rodgers dated September 19, 2006 as irrelevant;

3. Striking Exhibits B and E annexed in support of the Petitioner's instant motion as irrelevant and inadmissible hearsay;

4. Denying Petitioner's application for the appointment of a referee to determine money damages, on the ground that the original Petition failed to seek money damages, and on the further grounds that the type of damages sought by the Petitioner are not actionable in an Article 78 proceeding;

5. Denying Petitioner's application for a Stay on the ground that it is barred by Res Judicata;

6. Dismissing the Petition in its entirety on the ground that it fails to allege a legal claim for which relief can be granted in an Article 78 proceeding;

7. Granting costs as permitted by law;

8. For such other and further relief as this Court deems just and proper.

Dated: Rochester, New York
September 26, 2006

UNDERBERG & KESSLER, LLP

s/James V. D'Anza, Esq.
James A. Coniglio, Esq.
Attorneys for Respondent
Thomas E. Moran, Esq.
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Rochester, NY 14604
(585) 258-2800

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

In the Matter of the Application of

SEPHORA K. DAVIS,

Petitioner

For a Judgment under Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE, that upon the Verified Petition of the Petitioner dated May 17, 2006, with affidavits and exhibits annexed thereto; and upon the Verified Answer of Respondent Moran, verified the 1st day of September, 2006, with exhibit annexed thereto; and upon the affirmation of JOHN M. REGAN, JR., ESQ. dated

November 17th, 2006, submitted herewith; and upon the previous order of this Court dated October 17th, 2006; and upon the Exhibits attached hereto and submitted herewith, the undersigned will move this Court, at a regular term thereof, to be held at the Delores M. Denman Courthouse, 50 East Ave., Rochester, New York, on the **27th day of November, 2006, at 10 o'clock in the forenoon of that day**, or as soon thereafter as counsel may be heard, for an Order granting the following relief:

1. Pursuant to CPLR 2221(e) and 409(b), renewal of Petitioner's prior motion for judgment on the pleadings by Notice of Motion dated September 20th, 2006, based upon evidence newly discovered since the time said prior motion was brought and submitted for decision;

TOGETHER with such other, further and different relief which to the Court shall seem just, equitable and proper.

Dated: November 17, 2006

Yours, etc.

REGAN & REGAN, Attorneys
John M. Regan, Jr., Esq., of counsel
Attorneys for the Petitioner
SEPHORA K. DAVIS
Office and Post Office Address
29 Hoyt Place
Rochester, NY 14610
585.546.8880

TO:

UNDERBERG & KESSLER, LLP

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

In the Matter of the Application of

SEPHORA K. DAVIS,

Petitioner

For a Judgment under Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

AFFIRMATION

JOHN M. REGAN, JR., ESQ., pursuant to Rule 2106 of the CPLR, respectfully affirms to the Court as follows:

1. That I am the attorney for the Petitioner herein, and I make this affirmation in support of her request to renew her motion for judgment on the pleadings under CPLR 2221(e) and 409(b). The prior motion was denied by this Court by order dated October 17th, 2006, a copy of which is annexed hereto.

2. This motion is made upon newly discovered evidence. It may seem incredible to the Court that after the nearly three year long criminal prosecution of the Petitioner that underlies this special proceeding - a proceeding which was itself brought in May of this year, almost six months ago - that there could be any significant evidence newly discovered. I know it is
incredible to me.

3. Nevertheless, this evidence came into Petitioner's possession while Petitioner's previous motion for judgment on the pleadings brought by Notice of Motion dated September 20th, 2006 and submitted for decision October 2nd, 2006 was pending. It was provided by Respondent Moran's office to Donald M. Thompson, Esq., who now represents the Petitioner in Livingston County Court, and subsequently provided by Mr. Thompson's office to me.

4. The evidence consists of the statements of three individuals: Mechal Fuoco, Todd Gaddy, and Ashley Baker. These statements are all dated January 23rd and 24th, 2004.

5. As is more fully set forth below, these statements taken together show - conclusively, with no room for debate and as a matter of law - that Mount Morris Police Officer Dana Carson knowingly and maliciously, and in conjunction with Eric Harder (a police informant and, of course, Petitioner's rapist) falsely implicated the Petitioner as the driver, or "wheel man", in the armed robbery which took place in the Village of Geneseo on December 9th, 2003, for which the Petitioner was subsequently and illegally indicted.

6. Moreover, as more fully appears below, Respondent Moran either willfully withheld this evidence, knowing its significance, since December of 2004; or he is guilty of prosecutorial incompetence on a scale I would not

have thought possible. Either way, it should become abundantly clear to this Court, if it wasn't before, why this matter has come before it in the form of an extraordinary application for a writ of prohibition.

7. As indicated in my previous affirmation annexed to the Petition, I began representing the Petitioner in the underlying criminal matter around June of 2004.

8. As I gathered information from the Petitioner and her family, they complained repeatedly about the involvement of Mount Morris Police Officer Dana Carson in the arrest and prosecution of the Petitioner. They claimed that they had "heard" that his involvement in the investigation was extensive, that he was biased against their whole family, and that Carson was racist (the Petitioner is mixed race, her mother being Korean and her father Caucasian).

9. Of course, a lawyer hears many such complaints from people who are being prosecuted; however, their additional allegations that Carson had sexually harassed the Petitioner over an extended period were somewhat more unusual.

10. Annexed hereto as Exhibit "A" is a police report dated October, 2002. It was generated and signed by Dana Carson. It corroborates, at least in part, Petitioner's account of the harassment she endured by Carson beginning about that time, a little over a year before the events for which she is charged. Petitioner's affidavit describing this harassment is annexed to the original Petition as Exhibit "J".

11. Still, I did not consider this information terribly significant at first. I didn't think it would be particularly helpful at a trial of the Petitioner. Criminal defendants often complain about petty police misconduct, usually leaving juries rather unimpressed and in fact perhaps more hostile to the complaining Defendant than they would be

otherwise.

12. It was troublesome, however, that Dana Carson had been a witness to the statement of Eric Harder, the same statement that launched the entire criminal prosecution against the Petitioner and her alleged accomplices. When I subsequently learned that Harder had raped the Petitioner and the details of that event, Carson's involvement as a witness to Harder's statement seemed significant enough to me that I believed I should bring it to the attention of the prosecutor.

13. Annexed hereto as Exhibit "B" is a true and correct copy of a letter I sent to Respondent Moran with my first motions in the underlying criminal case. The letter is dated December 15, 2004. I had marked it "personal and confidential". Although the relatively normal and collegial tone of the letter appears quaint at this point, I would ask the Court to note that on the second page of the letter I delicately requested Respondent Moran to investigate Officer Carson's involvement. Respondent Moran's only response to this request was the terse and somewhat hostile silence that has characterized our very limited interactions ever since.

14. Most of the next year was consumed with Petitioner's competency to stand trial issues; however, a Huntley hearing was scheduled for October 25th, 2005 in Livingston County Court, and on the date of the scheduled hearing Mr. Moran provided some Rosario material that included that portion of the police notes annexed to the Petition as Exhibit "I".

15. Up to that point, all I knew about Officer Carson's involvement was that he was a witness to Eric Harder's statement; but the police notes made it clear that Carson was the initial police contact with Harder. I was very disturbed that Respondent Moran had concealed this information from me for over ten months when I had

specifically put him on written inquiry notice of its potential significance.

16. By then Respondent Moran had established a pattern of not simply neglecting, but *refusing* to turn over evidence, even when I would learn of its existence independently and request it from him. One of the items I had repeatedly requested of him, and which he refused to provide, was a statement I knew police had obtained from Mechal Fuoco, a very troubled young woman who had been one of the Petitioner's closest friends since childhood.

17. Annexed hereto as Exhibit "C" is the first item of newly discovered evidence: the statement from Mechal Fuoco dated January 23rd, 2004.

18. The statement was taken by Officer Dana Carson.

19. That much about the statement was not a surprise. One of the last avenues of investigation I had been pursuing before I was relieved as attorney of record in the underlying criminal proceeding was a recently renewed contact the Petitioner's family had made with Mechal Fuoco. That resulted in an affidavit I obtained from her on July 5th, 2006, and filed on July 6th, just prior to our court appearance in Geneseo. A true and correct copy of this affidavit is annexed hereto as Exhibit "D". It confirms that Dana Carson took the statement.

20. For purposes of this application, however, the significance of this statement is two fold: first, the substance of the statement, especially when considered in tandem with other evidence about Carson, indicates a pathological effort on his part to implicate the Petitioner; second, Mechal Fuoco in her July 5th, 2006 affidavit states that Dana Carson *wrote* the statement that she signed. As the Court can see from Exhibit "C", Dana Carson's handwriting is distinctive and peculiar: very small printing with oddly placed capitalization, among other things.

21. This brings us to the second item of newly discovered evidence, attached hereto as Exhibit "E": a statement from an individual named Ashley Baker, dated January 24th, 2004, supposedly in connection with the prosecution not of the Petitioner, but her alleged accomplice Shaun Theriault.

22. Upon information and belief, the basis of which is Dana Carson's distinctive handwriting along with my very recent interview of Ashley Baker, this statement was also taken by Dana Carson.

23. The Court needs to consider Ashley Baker's statement in conjunction with the final item of newly discovered evidence: the statement of Todd Gaddy, also dated January 24th, 2004, annexed hereto as Exhibit "F".

24. Upon information and belief, the basis of which is the fact that this statement is typewritten and my very recent interview of Todd Gaddy, this statement was *not* taken by Dana Carson, as Todd Gaddy and Ashley Baker had been placed in separate rooms at the police station where the statements were given.

25. Ashley Baker, in her statement which was written out by Dana Carson, claims to have overheard a lone comment by Shaun Theriault during a conversation taking place in a pizza shop in Mount Morris between her boyfriend, Todd Gaddy, and Shaun Theriault: "Sephora was the driver."

26. This is subtly - but definitively - contradicted by the actual party to the conversation Ashley Baker claims to have overheard: her own boyfriend, Todd Gaddy. Gaddy says that while there was a conversation in the pizza shop between himself and Shaun Theriault, he first learned of Shaun Theriault's involvement in the robbery only at a *subsequent* conversation taking place not at the pizza shop, but on the balcony of Todd's apartment, the next day.

27. In other words, according to Todd Gaddy the

conversation Ashley claims to have overheard in the pizza shop never took place, because the subject of "Sephora was the driver." could not have come up if Todd didn't even learn of *Shaun's* involvement until later.

28. Even without Todd Gaddy's contradictory statement, the fact that Ashley Baker's statement was taken by Dana Carson renders it inherently, and extremely, improbable. Dana Carson had a motive to falsely implicate the Petitioner. That is uncontroverted in this proceeding. Of all the possible and nearly limitless things that Ashley Baker could have overheard Shaun Theriault say in a supposed conversation about the robbery (e.g., "I had a shotgun", "We went to Geneseo", "The kid screamed when I pointed the gun at him", "They owed me money"), the chances that she would have overheard one thing that her police questioner had a motive to fabricate, *and only that one thing*, are too remote to be seriously considered. It is something on the order of a DNA match being wrong - again, not even considering that in addition, Ashley Baker's statement is contradicted by the statement of the actual party to the conversation she says she supposedly overheard, which statement was taken by different officers with no known motive to fabricate the contradicted evidence and who, unlike Dana Carson, appear to have been more appropriately interested in Shaun Theriault, who was obviously the matter at hand.

29. In sum, Ashley Baker's statement is the most assuredly false statement in the history of jurisprudence. Its falsehood cannot be rationally disputed. It is false as a matter of law.

30. More important than that, however, is what this shows - again, conclusively - about Dana Carson and his actual knowledge and intentions at the time.

31. As of January 24th, 2004 the official police investigation contained no information that the Petitioner

wasn't driving her car at the time of the robbery. Police had a statement obtained from the Petitioner on or about December 22nd, 2003 in which she indicated she had driven someone to the location in question at the time in question to buy marijuana for her (Exhibit "G"). And Eric Harder's statement of January 23rd (Exhibit "H" to the Petition) indicated that Petitioner drove her car for the robbery. There were no statements from the other alleged accomplices, Shaun Theriault and Adrian Paige, the only other persons in a position to say who was driving the Petitioner's car at the relevant time.

32. In other words, Carson went to the trouble to generate a false statement, the substance of which was to confirm a supposed fact - that the Petitioner was the driver for the robbery - that he *should* have had no reason to question at that time, as no one was officially disputing it - at that time. Yet the fact that he generated the false statement at all on that very point shows that he *did* have reason to question the point - or more precisely, *reason to know that it could be questioned by others.* There is no innocent explanation for this. In fact the only plausible explanation is that Harder himself originally told Carson the truth about the Petitioner's condition and the fact the she was not driving, as Harder was Carson's only known source for that information at the time.

33. Even Harder, who raped the Petitioner at knife point, must be embarrassed by the sheer audacious perfidy of the Petitioner's prosecution. It was Harder who let it slip, in his testimony before the Grand Jury in October of 2004, that Adrian Paige had been driving Petitioner's car, just as Adrian Paige later admitted (See transcript of Eric Harder's Grand Jury testimony, Exhibit "C" to the Petition, page 17, lines 17-20).

34. Another distressing aspect of the false statement Carson generated through Ashley Baker is its

allusion to a third, unnamed person who also allegedly overheard the supposed conversation, which - because the statement is definitively false - merely shows that Carson was prepared to brow-beat, bully, or threaten yet another person if necessary. Apparently, to Dana Carson, "evidence" is anything he can get someone to say by whatever force or intimidation he can bring to bear as a police officer, and unfortunately that force or intimidation is considerable. Just ask the Petitioner.

35. Since he has never, in the nearly three years Petitioner's prosecution has continued, come forward to admit what is now obvious, it is also apparent that Dana Carson has no compunction about employing the entire criminal justice apparatus for his own personal reasons - in this case as some weird, vindictive and ultimately criminal courtship ritual directed at the Petitioner. And like Respondent Moran, he is confident that everyone in the system, including this Court, is too stupid, confused, or disinterested to act, as the Livingston County Court regrettably already has been.

36. With respect to Respondent Moran, it is very unlikely that he did anything other than willfully conceal the evidence of Dana Carson's criminal conduct until, a few short weeks ago, his assistant provided to attorney Donald Thompson a large stack of documents, most of them never given to me, but which contained the definitive evidence of Carson's criminal conduct. Given the written notice Respondent Moran had of the relevance of that evidence in December, 2004 and the repeated subsequent requests, the conclusion that it was selectively and deliberately withheld is unavoidable. In fact, the act of turning the evidence over, and when it occurred, suggests that it was an attempt to make the plea Respondent Moran planned to extort from the Petitioner more effective.

37. The Court is confronted with a request to grant

a Writ of Prohibition against a truly perverse criminal action which is not *about* a criminal act, but which is itself a continuing criminal act. While Prohibition is always a matter of discretion, I respectfully submit that in this case there is really no sane alternative. The Court cannot let the tail of Eric Harder, Dana Carson and Respondent Moran wag the dog of our criminal justice system to the point where a young woman such as the Petitioner can be raped, threatened, intentionally prosecuted falsely, extorted into pleading, and then imprisoned. The prosecution of the Petitioner cannot be described as anything other than a barbaric legal atrocity. Attorneys and law enforcement officials of the Fourth Department, and indeed the whole world, need to know that such a grotesque and intolerable wrong will not in fact be tolerated.

Dated: November 17, 2006

s/JOHN M. REGAN, JR.

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FILED
SEP 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1707

IN THE

Supreme Court of the United States

SEPHORA K. DAVIS,

Petitioner,

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

MOTION FOR SUMMARY DISPOSITION AND OTHER RELIEF

SUPPLEMENTAL

JOHN M. REGAN, JR.
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MOTION

Petitioner, through undersigned counsel, pursuant to Rule 21 of this Court, hereby moves in the alternative for a Summary Disposition granting the Petition, and further granting to the Petitioner the following relief:

1. Ordering the Respondents, and each of them, to bring the Petitioner before the Livingston County Court in the Village of Geneseo, New York, order her immediate release from state custody, vacate her judgment of conviction, sentence and plea, and dismiss Livingston County Indictment 2004-276; and

2. Reversing the Order of the New York Court of Appeals under 4 Motion No. 194 dated March 27th, 2007, and reinstating Petitioner's Petition under New York Civil Practice Law and Rules Article 78 in the Nature of Prohibition; and

3. Remanding to the New York State Supreme Court, Appellate Division, Fourth Department, for further proceedings in accordance with New York State law, including the question of whether the Petitioner is entitled to money damages under New York Civil Practice Law and Rules section 7806.

ARGUMENT

Petitioner's Petition for Certiorari was docketed in this Court on June 27, 2007. On July 10th and 11th, 2007, Respondents filed waivers of their respective rights to respond to the Petition, and no timely response was in fact filed by either Respondent. Under Rule 15(2), the facts as related by the Petition in the statement of the case and the procedural history, complete with the many instances of police and prosecutorial misconduct, are therefore conceded.

Conscience shocking misconduct by state law enforcement officials has caused federal courts, including

this one, considerable consternation over many years in a variety of contexts. Albright v. Oliver, 510 US 266 (1994), the decision this Petition seeks to revisit, was an action under 42 U.S.C. 1983 involving a criminal prosecution based upon the scanty evidence of a notoriously unreliable police informant. It produced a plurality opinion from this Court which has generated confusion in the lower courts.

Far more odious, and yet surprisingly difficult of adjudication, was the case of United States v. Lanier, 520 US 259 (1997). Lanier was a state court judge from Tennessee who forced himself sexually upon women in his chambers, one of whom was a potential litigant before his very court, with all the attendant implications of adverse outcomes in the event his misconduct was exposed. He was convicted in District Court in a federal prosecution under 18 U.S.C. 242 (violating constitutional rights). His convictions were at first upheld by the 6th Circuit, but upon review *en banc* his convictions were overturned over several impassioned dissents (73 F.3d 1380), on the ground that his misconduct did not deprive his victims of "due process". This Court granted certiorari, reversed and remanded, whereupon the 6th Circuit ordered Lanier to surrender himself to federal custody. 120 F.3d 640 Incredibly, Lanier failed to surrender and fled to Mexico under an assumed name, and his appeal was dismissed. 123 F.3d 945

In overturning Lanier's convictions in the first instance, the 6th Circuit *en banc* panel was guided by this Court's decision in Screws v. United States, 325 US 91 (1945) Again a plurality opinion like Albright, Screws was a case under what is now 18 U.S.C. 241 and 242 and involved a group of Georgia law enforcement officers who beat an African-American man to death after arresting him - probably falsely - for stealing a tire. The problem complicating Screws was the proffered defense - characterized by concurring Justice Rutledge as "not pretty"

- that the conduct of Screws and his cohorts amounted to murder under state law, not the deprivation of a due process right cognizable in the federal prosecution.

The common thread between Screws, Lanier, and Albright has been the confusion over just what, if anything - beyond a trial - is the "process due" a litigant. And this Court has been reluctant to address this confusion for fear of adding to it by delving into murky areas such as "substantive due process". Even in Lanier, Justice Souter's opinion barely hinted that obviously repugnant conduct by state welfare officials, such as selling children into slavery, would amount to a violation of due process.[1]

But surely this Court's reticence is not meant to embrace the idea that state law enforcement officials are therefore free to fabricate and perjure their way to indictments and convictions - as has admittedly occurred in the case at bar - even where the officials' scheme, which included the victim's forcible rape, is uncovered, placed in issue and conceded *before* trial and sentencing. How can a "trial" of the victim, at that point, be rationally described as "due process"?

And this is not an isolated case: apparently, there is a shameless nationwide subculture within law enforcement. For example, in United States v. Melendez (unreported, other than 2004 U.S. Dist. LEXIS 620), Hon. Avern Cohn, a very respected and experienced Judge of the U.S. District Court for the Eastern District of Michigan, presided over the case of eighteen Detroit police officers prosecuted by the federal government for violating, again, 18 USC 241 and 242 . The federal indictment alleged that the officers

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[1] Justice Souter also cited Williams v. United States, 341 US 97 (1951), an opinion by Justice Douglas holding that police beating a confession out of a suspect obviously violates due process. Yet four Justices dissented, three of them citing the Court's previous decision in Screws.

had committed such acts as "...falsifying police reports and committing perjury to cover up illegal actions, planting evidence, and intimidating individuals who were illegally detained with threats of violence or unlawful arrest."

The officers moved to dismiss the indictment because, *inter alia*, "...there is no pre-existing law indicating that the use of false or fraudulent evidence in a criminal prosecution violates the Due Process Clause of the Fourteenth Amendment...". The officers cited in support of this proposition this Court's decision in Albright v. Oliver, 510 US 266 (1994), the very decision this appeal asks the Court to revisit.

With considerable difficulty, Judge Cohn denied the motion[2], relying on Circuit Court decisions such as Devereaux v. Abbey, 263 F.3d 1070, 1075(9th Cir., 2001)("There is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government. Perhaps because the proposition is virtually self-evident, we are not aware of any prior cases that have expressly recognized this specific right, but that does not mean there is no such right.")

The Court may be chagrined that its thoughtful consideration of the issue posed in Albright would be exploited by corrupt police officers as it was before Judge Cohn in Melendez. Similarly, in the case at bar the Court may believe it unnecessary, or even embarrassing, to prominently wrestle upon plenary review with the question of whether police, prosecutors and their agents - such as informants - can, consistent with the requirements of due process, rape a young woman at knife point, then

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[2] A recent phone call to Judge Cohn revealed that after the officers' motions to dismiss were denied, some of the eighteen were put on trial - but acquitted, a common result in federal criminal cases only where law enforcement officers are the defendants.

successfully terrorize her with threats of physical harm and lengthy imprisonment through the corrupt abuse of a state's criminal justice system. The question, in other words, may answer itself.

Nevertheless, Petitioner submits that the above described sad history of egregious misconduct by state law enforcement officials calls upon this Court to act in this instance - if not upon plenary review, then at least summarily.

Action by this Court is further supported because, in the case at bar, the Petitioner has been respectful of the principles of federalism which have often made these questions so difficult: she presented her arguments in the state trial court; in the state intermediate appellate court upon collateral review; and before the state's highest court. This Court should not now despise her anguished and careful effort to properly frame and present these important questions to this Court, leave her unjustly imprisoned and return her to those same state courts for an uncertain, lengthy and expensive appeal "process", which cannot at this point be any less constitutionally infirm than the process that has brought her here in the first place.

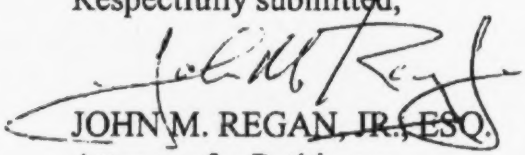
This Court's decision in Lanier provides a sound basis for summary disposition. Lanier held that a constitutional due process right can be clearly established by decisional law from the circuit courts, not just this Court. As noted by Judge Cohn in Melendez, at least five different circuit courts have concluded that violations of due process against a criminal defendant can occur prior to trial. United States v. McDermott, 918 F.2d 319 (2nd Cir., 1990); Geter v. Fortenberry, 849 F.2d 1550 (5th Cir., 1988); United States v. Epley, 52 F.3d 571 (6th Cir., 1995); Anthony v. Baker, 767 F.2d 657 (10th Cir., 1985); Devereaux v. Abbey, 263 F.3d 1070 (9th Cir., 2001) Thus, even if the Court should not wish to use the case at bar to re-examine the issue in Albright it can, based upon the

foregoing caselaw from the circuits, render a summary disposition in Petitioner's favor.

The Court should further direct that the Appellate Division, Fourth Department, upon remand, consider the question of whether Petitioner is entitled to money damages "incidental to the primary relief sought" in accordance with New York Civil Practice Law and Rules section 7806, a purely state law issue which this Court cannot address.

Dated: September 12, 2007

Respectfully submitted,



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Attorney for Respondent Kohout